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No.

In the Supreme Court of the United States

SADEK R. EBEID, M.D., ex rel. United States of America,
Petitioner,

v.

THERESA A. LUNGWITZ; EDWARD C. IRBY (MRS.), AKA Margaret Irby, individually and DBA HEALTH RESOURCE CENTER; HOME HEALTH RESOURCES, INC., an Arizona corporation; THE CROSSING HOSPICE CARE, INC., an Arizona corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. KHOURI
Counsel of Record
LAW OFFICES OF MICHAEL J. KHOURI
4040 BARRANCA PARKWAY
SUITE 200
IRVINE, CA 92604
(949) 336-2433
mkhouri@khourilaw.com

Counsel for Petitioner

October 4, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Whether the Court will endorse and adopt the theory of implied false certification as a theory of liability under the False Claims Act. Whether a *qui tam* plaintiff satisfies the False Claims Act pleading requirements by alleging a scheme to defraud Medicare by an illegal enterprise which bills Medicare in violation of a total regulatory impediment to billing. Whether such a *qui tam* plaintiff who alleges a total regulatory impediment to billing needs to satisfy the Federal Rule of Civil Procedure 9(b) strict particularity requirement, or the watered-down Rule 9(b) requirement adopted by the Ninth Circuit; or whether allegations of the illegal scheme are enough, especially when Plaintiff has no access to particular billing information.

Several United States Courts of Appeal have addressed these issues and have issued conflicting decisions. Certiorari is necessary in order to settle this important issue amongst the Circuits.

Petitioner, Sadek R. Ebeid, M.D. ("Ebeid") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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INTRODUCTION

This is a case which utilizes the False Claims Act to combat regulatory fraud. Here, the Ninth Circuit agreed with some of the other circuits and recognized the theory of implied false certification under the False Claims Act, 31 U.S.C. §§ 3729 *et seq*. Other Circuits have recognized or discussed the theory without deciding whether to adopt it; and even those Circuits that have adopted implied false certification have adopted different pleading standards ranging from strict particularity to no particularity. [*See infra*] The Ninth Circuit also adopted a new pleading standard under Federal Rule of Civil Procedure 9(b), holding that it is sufficient for a *qui tam* plaintiff to allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." In so holding, the Ninth Circuit affirmed the district court's order dismissing Ebied's Second Amended Complaint with prejudice.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Petitioner's Appendix "Pet. App." 1a-17a) is reported at No. 09-16122, slip op. 11249 (9th Cir. Aug. 9, 2010). The opinion of the United States District Court for the District of Arizona is not reported but is available at Pet. App. 18a-33a.

JURISDICTION

The court of appeals entered its judgment on August 9, 2010, and declined Ebeid's petition for rehearing on August 26, 2010. [*See* Pet. App. 34a-35a]

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, are reproduced at Pet. App. 36a-74a.

STATEMENT

A. Statutory and Regulatory Background

"The FCA was enacted during the Civil War with the purpose of forfending widespread fraud by government contractors who were submitting inflated invoices and shipping faulty goods to the government." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996). The FCA imposes civil liability upon anyone who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government...a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). The FCA also creates a form of civil action known as *qui tam*, in which a private person (the "relator") may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." § 3730(b)(1).

B. Facts

Ebeid filed a *qui tam* Second Amended Complaint under the FCA claiming that Theresa Lungwitz ("Lungwitz") submitted false certifications to the federal government in connection with Medicare

payments on behalf of three health care businesses in Phoenix, Arizona: Health Resource Center, LLC (the "Clinic"), Home Health Resources, Inc. (the "Home Health Agency") and The Crossing Hospice Care, Inc. (the "Hospice"). (Pet. App. 77a-82a). In his Second Amended Complaint, Ebeid also alleged that Lungwitz owned and operated all three entities along with a woman named Margaret Irby ("Irby") in some respect. (Pet App. 77a-79a). Neither Lungwitz nor Irby were ever licensed as physicians and the Clinic never held any license entitling it to deliver health care services. (Pet. App. 79a) (Hereafter defendants will be referred to collectively as "Lungwitz") Ebeid is a private physician in Arizona who gained knowledge of Lungwitz's fraudulent scheme through his own independent investigation into the scheme.

Ebeid's claims are centered around allegations that Lungwitz engaged in the unlawful corporate practice of medicine. Moreover, Ebeid alleges that the illegal corporate structure of the Lungwitz entities gave Lungwitz a prohibited amount of control over the medical decisions of physicians she employed and that referrals made amongst the three Lungwitz entities were unlawful under the Stark Law, making every claim submitted to Medicare by Lungwitz fraudulent under a theory of implied false certification. Implied false certification is a theory that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment from Medicare. [*See United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2nd Cir. 2001).]

C. Proceedings Below

1. Ebeid's original Complaint and First Amended Complaint were filed under seal in United States District Court for the District of Arizona. The district court unsealed the First Amended Complaint when the government elected not to intervene. Lungwitz answered, raising a Rule 12(b)(6) defense, among others. Ebeid moved to file a Second Amended Complaint, and the district court granted the motion without opposition. Lungwitz motioned for an order dismissing the Second Amended Complaint for lack of particularity under Rule 9(b) and failure to state a claim under Rule 12(b)(6). The district court eventually granted Lungwitz's motion to dismiss the Second Amended Complaint for insufficient pleading under the Rule 9(b) pleading standard (Pet. App. 18a-33a). The district court further held that "legal and regulatory violations alone cannot constitutive a claim under the FCA." (Pet. App. 27a-29a).

2. Ebeid timely appealed the district court decision to a panel of the Ninth Circuit. The panel affirmed the district court's dismissal of the Second Amended Complaint, finding that "Ebeid fail[ed] to plead fraud with sufficient particularity to satisfy the pleading standard under Federal Rule of Civil Procedure 9(b)." (Pet. App. 5a) However, in affirming the district court's dismissal, the panel expressly adopted for the first time the theory of implied false certification under the FCA. (Pet. App. 5a) The panel also adopted a new pleading standard whereby "the Rule 9(b) standard may be satisfied by pleading with particularity a reasonable basis to infer that the government either paid money or forfeited moneys due." (Pet. App. 11a-12a)

3. Ebeid timely sought rehearing arguing that the panel's opinion changed the law under which Ebeid's Second Amended Complaint was originally filed. When the Second Amended Complaint was before the district court, the existing rule was that a relator was required to identify representative samples of false claims to support every allegation of a FCA complaint. (Pet. App. 29a-30a) In deciding this case, the Ninth Circuit noted that "use of representative samples is simply one means of meeting the pleading obligation." (Pet. App. 11a) Ebeid requested that a rehearing be granted so the court could enter an order remanding the case back to the district court with leave to amend under the new pleading standard. Or, in the alternative, Ebeid requested that the court remand the case back to the district court with instruction that the district court exercise its discretion to determine whether Ebeid may have an opportunity to amend his pleading given the new standard adopted by the court. Without issuing an opinion, the panel denied Ebeid's petition for rehearing on August 26, 2010. (Pet. App. 34a-35a)

REASONS FOR GRANTING THE PETITION

This is a case that calls upon the Court to authorize utilization of the FCA to combat an illegal enterprise from billing Medicare contrary to a total regulatory impediment to billing. In doing so, we respectfully urge the Court to universally adopt the theory of implied false certification for purposes of FCA liability. Moreover, in order to best arm those set on uncovering fraud, the Court must dispose of any requirement that particular billing information be plead when a total regulatory impediment to billing is alleged. Failure to remove this pleading restriction will only allow those

perpetrating fraud to more easily conceal their unlawful activities.

Moreover, failure to remove the pleading restriction will result in a lifeless FCA; relegating the status of Medicare trust monies to a personal slush fund for those intent on defrauding the system by failing to comply with regulatory requirements.

I. THE COURT SHOULD UNIVERSALLY ADOPT THE THEORY OF IMPLIED FALSE CERTIFICATION FOR FALSE CLAIMS ACT LIABILITY

A. Direct False Claim Theory

Historically, the FCA has been used predominantly to combat billing the government for services not rendered or for services that were excessive. [*See* Robert Fabrikant et al., Health Care Fraud: Enforcement and Compliance §2.02 (2009 ed.)] Such a "direct false claim theory involves making an intentional false representation that causes the Government to pay more than it would have absent the misrepresentation." Joel Androphy, Federal False Claims Act and Qui Tam Litigation §3.02[1] (2010 ed.) Put another way, the fraudulent conduct arises out of a Medicare provider claiming they did something when, in fact, they did not.

Medicare was signed into law in 1965 to make health care available to the elderly, unemployed, self-employed, and low-paid workers left without health insurance. [*See* Fabrikant at §1.02] Along with Medicare came various regulations that told providers what billing procedures were proper and improper (i.e.,

False Claims Act, Anti-kickback and Stark Law). Congress implemented these regulations out of fear that the financial incentives connected to the delivery of health care could "corrupt medical judgment, encourage unnecessary medical procedures, subsidize marginal providers, and discourage competition." *Id.* at §2.03[1][a]. These laws also created a new theory of liability, called false certification, where a provider could face liability for improperly billing Medicare regardless of whether the services were performed and regardless of whether the services were excessive.

B. False Certification Theory

Under the false certification theory, FCA liability may also exist "where a government payee falsely certifies compliance with a condition – usually a statute, regulation, or contract term – that is a prerequisite to government payment." Androphy at §3.02[2]. Under the false certification umbrella are two sub-theories: *express false certification* and *implied false certification*.

1. Express False Certification

"Under an express false certification theory, FCA liability attaches when a claim expressly contains a false statement of compliance with a 'particular statute, regulation, or contractual term, where compliance is a prerequisite to payment.'" *Id.* at §3.02[2][a] (citing *Mikes*, 274 F.3d at 698).[1]

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[1] Express false certification is not at issue in this petition, but is merely mentioned for reference.

2. Implied False Certification

Under an implied false certification theory, which is applicable in the present case, "FCA liability may attach even where there is no express statement of compliance contained in the claim." *Androphy* at §3.02[2][b]. The theory was first applied in *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (Fed. Cl. 1994). There the Court of Federal Claims held that defendants' submission of payment vouchers, which contained no expressly false representations, implicitly certified their continued adherence to the eligibility requirements under their contract with the Small Business Administration's program. [*See Ab-Tech* at 434.] The defendants' failure to adhere to the requirements for participation in the program rendered their claims for payment false, resulting in FCA liability. [*See Id.* at 433-34.]

Since *Ab-Tech*, a number of appellate courts have recognized implied false certification as a theory of liability in FCA cases, including the Ninth Circuit in this case. [*See* Pet. App. 1a-17a; *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 414-15 (6th Cir. 2002); *United States ex rel. Siewick v. Jamieson Science & Engineering, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217-18 (10th Cir. 2008); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005).] Although no Circuit has yet expressly rejected implied

false certification,[2] several additional Circuits have recognized or discussed the theory without deciding whether to adopt it. [*See United States ex rel. Quinn v. Omnicare, Inc.*, 382 F.3d 432, 441-43 (3d Cir. 2004); *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 382-83 (5th Cir. 2003); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 n.8 (4th Cir. 1999).]

Historically, the legislative history of the 1986 amendments to the FCA shows that Congress intended to impose liability whenever a person submits a claim knowing he is ineligible for payment, even where the person provided the specific product or service requested by the government. *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 (stating that "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program..."). Therefore, the crux of the theory is that false certifications may not necessarily be made in connection with the request for payment, but that the claim may still be deemed legally false where it implicitly, but falsely, represents compliance with all conditions that are relevant to the government's decision to pay the claim.

Here, Ebeid does not allege that the Lungwitz enterprise submitted claims to Medicare for services that were excessive or not rendered (although if given

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[2] Androphy at §3.02[2][b] (citing *United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F.Supp.2d 258, 266 (D.D.C. 2002) ("[T]he Court could find no court of appeals decision expressly rejecting implied certification, although some circuits have expressed reservation.").

the opportunity, discovery may disclose such violations). Instead, Ebeid alleges that the enterprise itself was illegal; making every claim submitted by Lungwitz false because each claim would have been certified as being submitted by a provider in complete compliance with all regulatory conditions. However, this was not the case. The Second Amended Complaint alleges that Lungwitz was not licensed as a physician and therefore the enterprise was operating unlawfully under the prohibition of the corporate practice of medicine. (Pet. App. 79a-81a) Moreover, the Second Amended Complaint alleges that the illegal corporate structure of the Lungwitz enterprise gave Lungwitz a prohibited amount of control over the medical decisions of the physicians she employed and that the enterprise illegally referred patients amongst the three entities owned by Lungwitz. *Id.* Lastly, the Second Amended Complaint alleges that had Medicare been aware of the illegal nature of the Lungwitz enterprise, it would not have paid any claims submitted by Lungwitz. (Pet. App. 84a-85a)

Such is the exact type of fraud for which the FCA was created to prevent. Therefore, it is imperative that this Court universally endorse and adopt the viability of implied false certification under the FCA. Implied false certification stops fraud at its very root by ensuring regulatory compliance in each and every claim submitted to the government for payment. Without such an arrow in the quiver of those out to stop fraud, FCA offenders will continue to bill unrestrained and continue to bleed the Medicare trust fund dry while laughing in the face of regulation. Numerous courts of appeals have already acknowledged the significance of the implied false certification theory. We urge the Court to

acknowledge it as well and give guidance to those circuits that have cautiously refrained from fully recognizing the theory.

II. THE COURT SHOULD REMOVE ANY PARTICULARITY REQUIREMENT IN PLEADING WHEN A *QUI TAM* RELATOR ALLEGES A TOTAL REGULATORY IMPEDIMENT TO BILLING

There is a split amongst the courts of appeals regarding the amount of particularity a *qui tam* relator must allege in order to satisfy Rule 9(b). As the Sixth Circuit has insisted, "Rule 9(b) is not to be read in isolation, but is to be interpreted in conjunction with Federal Rule of Civil Procedure 8." *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 501 F.3d 493, 503 (6th Cir. 2007). Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of a person's mind may be averred generally." However, when read against the backdrop of the "notice pleading" requirements of Rule 8, "it is clear that the purpose of Rule 9 is not to reintroduce formalities to pleading, but is instead to provide defendants with a more specific form of notice as to the particulars of their alleged misconduct." *Id.* Beyond giving notice, Rule 9(b) requires a party to "state with particularity the circumstances constituting fraud or mistake," including "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

The discrepancy within the circuits lies in the amount of particularity a party is required to allege in order to survive a Rule 9(b) motion to dismiss. Some circuits abide by a strict application of Rule 9(b) particularity, or absolute particularity standard. Others have applied a more relaxed particularity standard, but still require a "reliable indicia" that claims were submitted. Such standards handcuff those who are out to prevent fraud by requiring FAC relators to have access to actual billing information in order to make it to trial. That should not be the case and the strict particularity pleading standards should be abolished when a relator alleges a total regulatory impediment to billing.

A. Absolute Particularity Standard

Courts that strictly apply the heightened pleading under Rule 9(b) typically recite three justifications for applying the standard: (1) it ensures that defendants have the specific notice necessary to prepare a response; (2) it prevents prospective plaintiffs from engaging in fishing expeditions to uncover moral wrongs; and (3) it protects defendants' reputations against damage stemming from accusations of immoral conduct. *Bledsoe* at 503 n.11. Those circuits require that a relator identify representative examples of false claims to support every allegation within a complaint. [*See United States ex rel. Karvelas v. Melrose-Wakefield Hospital*, 360 F.3d 220, 233 (1st Cir. 2004) (citing *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1312 n.21 (11th Cir. 2002)("some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b)."); *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552, 557 (8th Cir. 2006)("to satisfy Rule 9(b)'s

particularity requirement and to enable [defendants] to respond...Dr. Joshi must provide *some* representative examples of their alleged fraudulent conduct...")]

In certain instances, the strict pleading requirements have been relaxed in FCA suits where the complaint alleges numerous or long-running fraudulent transactions, or when the facts of the alleged fraud are particularly within the defendant's knowledge or control. [*See* Androphy at §9.03[1][b].] However, even relaxing the standard does not cure the illogical barriers that Rule 9(b) places upon a relator. Requiring "representative samples" is still absolute particularity. As the dissent in *Clausen* correctly points out, the effect of absolute particularity is just "as likely to result in the dismissal of meritorious lawsuits as it is to protect defendants from unwarranted litigation." *Clausen* at 1318 (Barkett, J., dissenting). When analyzing the three justifications for applying absolute particularity, one can see that the "Rule 9(b)-foot" does not always fit in the "FCA shoe;" particularly when a total regulatory impediment to billing is alleged.

1. Notice to Defendant

The first purpose – providing defendant notice of the misconduct – is not frustrated where a relator alleges a total regulatory impediment to billing without absolute particularity. In *Clausen*, the relator alleged that a laboratory orchestrated a scheme of improper billing to the government. *Clausen,* 290 F.3d at 1303. Unheeded by strict application of Rule 9(b), the dissent correctly recognized that "the essence of the fraud in this case lies in the scheme to perform

unnecessary tests, rather than in the claims for payment." *Id.* at 1316. There, Judge Barkett found that the only issue was whether the underlying tests were medically necessary.[3] *Id.* In the present case, the illegal scheme by which Lungwitz improperly billed Medicare constitutes the heart of the misconduct that Lungwitz must defend against. Just as the defendant in *Clausen* would be free to answer Clausen's complaint by showing that it never submitted bills for any of the alleged tests, Lungwitz would be free to answer Ebeid's Second Amended Complaint simply by showing that she was, in fact, in compliance with all regulatory requirements required by Medicare in order to receive reimbursement for submitted claims. Ebeid has identified the specific framework of the Lungwitz scheme and why it was improper. The amount of, and precise dates on which claims were submitted to the government are not necessary to alert Lungwitz to the nature of the alleged misconduct.

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[3] The dissent noted that "[i]t would be different if Clausen alleged, for example, that LabCorp had billed for tests that it never performed. In that case the specific dates on which claims for payment were submitted to the government might well be necessary to satisfy the requirements of Rule 9(b). But that is not the case." That is also not the issue in the present case, where Ebeid is not claiming that services were performed that were not medically necessary or never performed at all. Instead, Ebeid alleges that due to the illegal nature of the Lungwitz enterprise, every single claim submitted to the government for payment was false.

2. Prevent Fishing Expeditions and Harm to Reputation

The second and third purposes – preventing fishing expeditions and/or harm to reputation – likewise are not frustrated where a relator alleges a total regulatory impediment to billing without absolute particularity. Just as the dissent in *Clausen* found, Ebeid's Second Amended Complaint alleges with sufficient particularity "the facts constituting the essence of the fraudulent conduct," by laying out "the circumstances of the fraud that would not be a matter of common knowledge or common sense." *Clausen*, 290 F.3d at 1316. When an outsider has no prediscovery means of access to specific billings, "the lack of that information tells us nothing about the likelihood that the lawsuit is frivolous." *Id.* at 1317. Lastly, Judge Barkett concludes her dissent by voicing concern that absolute particularity is "as likely to result in the dismissal of meritorious lawsuits as it is to protect defendants from unwarranted litigation." *Id.* at 1318. By alleging the particular scheme by which Lungwitz illegally billed Medicare, Ebeid has overcome the threshold of Rule 9(b) to protect from frivolous lawsuits. Additional specificity at this stage in the litigation does little to further the purported purposes behind Rule 9(b).

3. The Extinction of Rule 9(b)

This case actually presents the Supreme Court with an opportunity to develop law and to expand access to the federal courts by FCA relators. "The sponsors of the [FCA's] 1986 Amendments have bipartisan support for the proposed False Claims Corrections Act, which would allow plaintiffs with detailed knowledge of

fraudulent activity to bring cases even when they lack access to the defendant's false billing records."[4] Indeed, the recent passing of The Fraud Enforcement and Recovery Act of 2009 embodies the first wave of changes to the FCA, which intend to broaden the liability of persons defrauding the government.[5] Another bill, which has been approved by the House Judiciary Committee, specifically details an amendment to the FCA that intends to expressly exempt FCA plaintiffs from the pleading requirements of Rule 9(b), and reads:

> "Notice of Claims - In pleading an action brought under section 3730(b), a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in a complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 1729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged

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[4] Androphy at 9-17, n. 1 (citing Marcia Coyle, "Clash Between Trial Bar and Business Expected Over False Claims Act," The National Law Journal, August 11, 2008). The False Claims Corrections Act is a name which was given to a number of bills developed in Congress to amend the FCA.

[5] *See* Marcia Coyle, "Fears Rise Over New Fraud Law," The National Law Journal, May 25, 2009 (stating that the new law reverses the Supreme Court's 2008 decision in Allison Engine Co. v. United States, ex rel., Sanders, 471 F.3d 610 (6th Cir. 2006), *cert granted*, 128 S. Ct. 491 (2007), *rev'd on other grounds*, 128 S. Ct. 2123 (2008), to make clear that a person or entity can be liable under the FCA even if there was no specific intent to get paid by the federal government.)

> misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made."[6]

Clearly, there is great support for a published case establishing that a relator in a FCA case need not allege particular billing information when the case is based upon a total regulatory impediment to billing. All policy indicators are in accord. A ruling requiring billing information in a regulatory impediment case would promote fraud, not deter it. Hospitals, clinics, and other health care agencies that engage in the corporate practice of medicine and violate Stark, will be encouraged to devise elaborate schemes to avoid detection of precise billing facts. Essentially, the more elaborate and stealthy the scheme, the greater the chance it will avoid detection.

The Court should also consider, for policy reasons, the fact that health care billing information is private. [*See* 45 C.F.R. parts 160 and 164, promulgated pursuant to the Health Insurance Portability And Accountability Act ("HIPAA")]. Whether a FCA relator is a doctor, nurse, or staffer, such a relator is absolutely prohibited from collecting such billing information; even for the purpose of bringing a FCA case. The Court should adopt a rule that FCA cases based upon a total regulatory impediment to billing may be brought by particularly alleging the nature of the fraud, but not necessarily alleging the actual fraudulent billing detail. Such a ruling would promote the private nature of health care information and deter

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[6] *See* H.R. 1788, 111th Cong. (2009)

prospective relators from literally stealing such information in order to bring a lawsuit.

Certainly, one hopes Lungwitz's scheme does not become the model for the delivery of health care in the United States. Doctors must be in control of their practices; free to make decisions about diagnosis and treatment. Moreover, doctors should be encouraged to keep abreast of billing information in order to deter billers from committing acts such as fraudulent upcoding[7] and unbundling.[8] Absolute particularity encourages corporate schemers to control medical practices with an emphasis on profit, not the safe delivery of health care to those in need.

In this case, Lungwitz was not cherry-picked by a horde of opportunistic plaintiff lawyers. The suit was not filed to extort money with allegations of fraud. Ebeid's Second Amended Complaint specifically alleges two separate regulatory impediments to billing that prohibited Lungwitz and her corporations from billing

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[7] "Upcoding" is the term for the practice of billing MediCare or Medicaid using a billing code providing a higher payment rate than the billing code intended to be used for the item or service furnished to the patient (*e.g.*, billing a simple office visit as an emergency office visit or a comprehensive visit). Carrie Valiant & David E. Matyas, Legal Issues in Healthcare Fraud and Abuse: Navigating the Uncertainties, at 173 (2d ed. 1997).

[8] "Unbundling" or "fragmentation" is the practice through which providers submit bills piecemeal rather than submit the procedure or product as a whole (*e.g.*, MediCare prescribes a special reimbursement rate for a group of laboratory procedures that commonly are ordered together, but the lab bills at the higher separate rate for each component, as opposed to billing at the lower, special rate). Valiant, *supra* note 4, at 177.

MediCare for any services rendered –whether medically necessary or not. Accordingly, the Court should reinstate Appellant's Second Amended Complaint and do away with the application of Rule 9(b) when a total regulatory impediment to billing is alleged.

B. Relaxed Rule 9(b) Particularity Standard

In certain circumstances, courts have attempted to relax the strict pleading requirements of Rule 9(b) in FCA suits where the facts of the alleged fraud are particularly within the defendant's knowledge and control, or where the alleged scheme of fraud involves numerous or long-running transactions. [*See* Androphy at 9-22] While this may appear to be a relaxed standard, in actuality it is nothing more than absolute particularity in disguise. [*See Bledsoe* 501 F.3d at 510 (holding that when relator pleads a complex and far-reaching fraudulent scheme, he must provide "representative samples of the broader class of claims.")] Without specific billing information, a relator will never be able to meet even this "relaxed" standard because the only way they will be able to show that billing took place is if they themselves took part in the fraudulent billing conspiracy.

In deciding this case, the Ninth Circuit adopted a Fifth Circuit pleading standard that Rule 9(b) is satisfied when "particular details of a scheme to submit false claims [are] paired with reliable indicia that lead to a strong inference that claims were actually submitted." (Pet. App. at 10a) (citing *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). The *Grubbs* court provided an example of the necessary "reliable indicia"

as: "dates and descriptions of recorded, but unprovided, services and a description of the billing system that the records were likely entered into." *Grubbs*. at 191. However, when such information is strictly within the control of the defendant, the class of possible relators is extremely limited. As such, only those who have unclean hands, or who have partaken in the fraud themselves, will be able to meet this standard.

C. No Particularity Standard

As explained above, this petition calls upon the Court to adopt the theory of implied false certification in order to utilize the FCA to combat regulatory fraud. In order to fully effectuate this goal, the Court must abolish any particularity requirement, or watered-down particularity requirement under Rule 9(b) when a total regulatory impediment to billing is alleged. Otherwise, there will be a remedy without any teeth because the only people with access to the required billing information will be those who are involved in the fraud themselves.

Such a standard is not without precedent. In *United States ex rel. Franklin v. Parke-Davis, Division of Warner-Lambert Co.*, 147 F.Supp.2d 39, 49 (D. Mass. 2001), a complaint was found to satisfy the requirements of Rule 9(b) where the complaint amply alleges a general framework of fraud and provided specific information on the individuals, locations, and precise statements alleged to be false and time-frames involved. The *Franklin* court found that when the relator does not have pre-discovery access to patient-specific information and "where the alleged scheme of fraud is complex and far-reaching, pleading every

instance of fraud would be extremely ungainly, if not impossible." *Id.* [*See also* citing *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F.Supp.2d 1017, 1049 (S.D. Tex. 1998)(holding relator satisfied Rule 9(b) by alleging the "basic framework, procedures, the nature of fraudulent scheme, and financial arrangements and inducements among the parties and physicians that give rise to Relator's belief that fraud has occurred"); *United States v. Kensington Hosp.*, 760 F.Supp. 1120, 1125 (E.D. Pa. 1991)(requiring government in FCA action to plead only the time-frame, the clinics involved, and the types of kickbacks involved); *United States ex rel. Pogue v. American Healthcare Corp.*, 977 F.Supp. 1329, 1332-33 (M.D. Tenn. 1997)(permitting relator to omit allegations concerning each instance of fraudulent conduct); *United States ex rel. Downy v. Corning, Inc.*, 118 F.Supp.2d 1160, 1172-73 (D.N.M. 2000)(allowing relator to plead general scheme of fraud where information concerning individual instances of fraud could be sought during discovery).]

We urge the Court to reject strict application of Rule 9(b) to all FCA cases universally. Surely, under certain circumstances, strict application may still be viable. For example, where the falsity of a claim for payment depends upon the presence of false statements in the claim itself (*e.g.*, where a complaint raises allegations of excessive billing or billing for services never rendered), identification of that claim may properly be required. Conversely, however, where the falsity of the claim is based upon the defendant's non-compliance with regulatory standards required in order to submit the claim in the first place, identification of specific claims submitted to the

government for payment is immaterial at the pleading stage of litigation.

III. THE COURT SHOULD ALLOW EBEID LEAVE TO AMEND UNDER THE NEW PLEADING STANDARD

This case also involves standards of conduct for attorneys in the district courts. Federal Rule of Civil Procedure 15 provides that leave to amend shall be freely given when justice so requires. Justice so requires in this instance because after the Ninth Circuit's recent opinion in this case, there has been a change in the pleading standard under which Ebeid's Second Amended Complaint was originally filed.

As discussed above, when Ebeid's Second Amended Complaint was originally filed back in January 2009, the landscape of the Rule 9(b) pleading requirements was vastly different. At that time, the district court followed the existing rule that a relator was required to identify representative samples of false claims to support every allegation of a FCA complaint. (Pet. App. at 28a-29a) Indeed, the district court applied a standard of representative sample and added absolute particularity. *Id.* This standard was greater than recognized by existing law at the time. Ebeid knew he could not satisfy that standard and therefore did not believe that it was ethical, appropriate, or possible to amend given Ebeid's obligations under the Federal Rules of Civil Procedure. Likewise, when Ebeid appealed to the Ninth Circuit, the Circuit standard had yet to have been decided. (Pet. App. at 5a) As such, Ebeid was cautious to utilize information he had relating to a single patient believed to have received treatment at the Lungwitz Clinic. As a result, Ebeid

did not plead these facts and did not request leave to amend when opposing dismissal in the district court.

Ebeid has information, and had such information at the time the Second Amended Complaint was filed, of a single patient who was treated at the Lungwitz Clinic. Ebeid is aware of the approximate time this patient was treated at the Clinic. Ebeid believes this patient was a Medicare beneficiary. Ebeid assumes Lungwitz billed Medicare for the patient's treatment, but possesses no billing information whatsoever.

Because of the state of the law at the time, it was impossible for these allegations to have become part of the record. Ebeid could not predict the future or that the law was going to change. Indeed, it would have been frivolous for Ebeid to plead as such because there was no basis at law at that time to endorse the theory that even a single claim (as opposed to absolute particularity in addition to a representative sample requirement) would sufficiently satisfy the pleading requirements.

A party should not be punished for honestly advising a court that no basis exists to amend a pleading under the applicable standard. When on appeal however, the standard changes, the party should always be allowed an opportunity to amend in an attempt to meet the new standard. Otherwise, parties will always be asking for leave to amend, even when there is no basis, like a never-ending metronome. This case is unlike the typical situation where a dismissal without leave to amend effectively terminates an action [*See Scott v. Eversole Mortuary*, 522 F.2d 1110 (9th Cir. 1975)]. Here, new law has been made that directly relates to Ebeid's ability to

plead his case with sufficient particularity under the new standard.

Moreover, the making of such an allegation would have constituted a concession that such allegations were required. Simply put, this case affected a substantial change in the law and Ebeid should have been allowed an opportunity to satisfy the new pleading standard through an amended pleading.

CONCLUSION

This case calls upon the Court to give teeth to the FCA. In cases like this – involving a total regulatory impediment to billing – the requirement of any degree of particularity in pleading will render the FCA meaningless as only those involved in the fraudulent scheme will have access to any particular billing information. Moreover, in cases like this, particularity is immaterial since Petitioner has always argued that every bill submitted to the government for payment was fraudulent due to the illegality of the illegal enterprise. Petitioner calls upon the Court to discard an archaic and outdated pleading requirement that does no more than elevate form over substance and does not promote justice.

Finally, Petitioner also calls upon the Court to weigh in on the current debate over the delivery of health care to those most in need in the United States. The Court has a prime opportunity to influence health care policy by re-arming a primary weapon utilized to combat fraud. The Court will also assist in preserving the public fisc and the financial resources available to provide quality health care to the elderly and others in

our society that are also in need of assistance. Accordingly, the Court should grant this petition.

Respectfully Submitted,

Michael J. Khouri
Counsel of Record
Law Offices of Michael J. Khouri
4040 Barranca Parkway
Suite 200
Irvine, CA 92604
(949) 336-2433
mkhouri@khourilaw.com

Counsel for Petitioner

APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16122
D.C. No. 2:08-cv-0544-SRB

[Filed August 9, 2010]

SADEK R. EBEID, M.D., ex rel. United States of America, *Plaintiff-Appellant*,	)
v.	)
THERESA A. LUNGWITZ; EDWARD C. IRBY (MRS.), AKA Margaret Irby, individually and DBA Health Resource Center; HOME HEALTH RESOURCES, INC., an Arizona corporation; THE CROSSING HOSPICE CARE, INC., an Arizona corporation, *Defendants-Appellees*.	)

OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
March 9, 2010—San Francisco, California

Filed August 9, 2010

Before: J. Clifford Wallace, Susan P. Graber, and Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

Michael J. Khori, Law Offices of Michael J. Khori, Irvine, California, for the plaintiff-appellant.

Paul G. Ulrich and Noel C. Capps, Renaud Cook Drury Mesaros, PA, Phoenix, Arizona, for the defendants-appellees.

Astrid G. Meghrigian, California Medical Association, Sacramento, California, for the amicus curiae.

OPINION

McKEOWN, Circuit Judge:

In this appeal under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3731, Sadek Ebeid claims that

Theresa Lungwitz submitted false certifications to the federal government in connection with Medicare payments for three health care businesses: Health Resource Center, LLC (the "Clinic"), Home Health Resources, Inc. (the "Home Healthcare Agency") and The Crossing Hospice Care, Inc. (the "Hospice"). (We refer to the defendants collectively as "Lungwitz," except where it is necessary to identify individual defendants.) Central to Ebeid's claims are the allegations that Lungwitz engaged in the "unlawful corporate practice of medicine" and that referrals among the health care businesses were unlawful, which allegedly makes fraudulent every claim for Medicare reimbursement during that period.

"The FCA was enacted during the Civil War with the purpose of forfending widespread fraud by government contractors who were submitting inflated invoices and shipping faulty goods to the government." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996). To encourage insiders to disclose fraud and thereby bolster enforcement, the FCA contains a *qui tam* provision that permits private persons (known as "relators") to bring civil actions on behalf of the United States and claim a portion of any award. *See* 31 U.S.C. § 3730(b), (d) (2008); *Hopper*, 91 F.3d at 1266 n.7. At the time that Ebeid filed his

Second Amended Complaint,[1] the FCA imposed liability on anyone who, *inter alia*:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . . .

31 U.S.C. § 3729(a) (2008).

Ebeid, a private physician in Arizona, is not an insider in Lungwitz's businesses and does not raise a typical FCA claim that Lungwitz overcharged the government for services provided, or that she made express false certifications to the government to

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[1] Ebeid's original complaint and his First Amended Complaint were filed under seal. The district court unsealed the First Amended Complaint when the government elected not to intervene. Lungwitz answered, raising a Rule 12(b)(6) defense, among others. Ebeid moved to file a Second Amended Complaint, and the district court granted the motion without opposition. In a later Scheduling Order, the district court instructed the parties that further amended complaints should not be filed. The district court eventually granted Lungwitz's motion to dismiss the Second Amended Complaint for failing to meet the pleading standard of Rule 9(b).

receive payment. Instead, Ebeid alleges that *all* of the Medicare billing submitted by Lungwitz was unlawful under a theory of implied false certification. Ebeid alleges that the illegal corporate structure of the health care businesses gave Lungwitz a prohibited amount of control over the medical decisions of physicians employed in the various enterprises and that the health care businesses illegally referred patients amongst themselves.

Ebeid raises a theory of implied false certification, "based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment." *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001). Although we reserved the issue of whether this theory was viable in *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1172 n.1 (9th Cir. 2006), we now join our sister circuits in recognizing a theory of implied certification under the FCA. *See United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217-18 (10th Cir. 2008); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *Mikes*, 274 F.3d at 699. Nonetheless, even under this theory of implied false certification, Ebeid fails to plead fraud with sufficient particularity to satisfy the pleading standard under Federal Rule of Civil Procedure 9(b). Thus, on *de novo* review, we affirm the district court's dismissal of his Second

Amended Complaint.[2] *See United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001).

I. IMPLIED FALSE CERTIFICATION

[1] We address first whether the FCA contemplates an implied false certification claim. The first court to recognize implied false certification was the Court of Federal Claims in *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (Fed. Cl. 1994), *aff'd mem.*, 57 F.3d 1084 (Fed. Cir. 1995) (table). There, to participate in a government program, the defendant signed a "Statement of Cooperation," promising to comply with "the program's requirements for continuing eligibility." *Id.* at 432. The court found that claims for payment submitted to the government "represented an implied certification . . . of [the defendant's] continuing adherence to the requirements for participation," even though individual claims for payment did not require a certification of compliance. *Id.* at 434. Thus, the defendant's non-compliance rendered the claims "false," and liability attached under the FCA. *Id.*

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[2] The district court's order did not specify whether it dismissed the Second Amended Complaint with prejudice. After the Second Amended Complaint was filed, the district court notified the parties in its Scheduling Order that further amended complaints should not be filed. In addition, on appeal Ebeid does not challenge that order or seek leave to amend; instead he requests only reinstatement of the Second Amended Complaint. As we explain below, the Second Amended Complaint does not state a claim on which relief can be granted, and it would be futile to remand for its reinstatement. Thus, we construe the order as dismissal with prejudice.

[2] Since *Ab-Tech*, the Second, Sixth, Tenth, and Eleventh Circuits have endorsed the implied false certification theory. *See Mikes*, 274 F.3d at 699-700; *Augustine*, 289 F.3d at 415; *Conner*, 543 F.3d at 1217-18; *McNutt*, 423 F.3d at 1259. The Second Circuit in *Mikes* observed that "[f]oundational support for the implied false certification theory may be found in Congress' expressly stated purpose that the Act include at least some kinds of legally false claims and in the Supreme Court's admonition that the Act intends to reach all forms of fraud that might cause financial loss to the government." 274 F.3d at 699 (citations omitted).

In *Mikes*, the plaintiff argued that by submitting Medicare reimbursement forms, the defendant implicitly certified compliance with two Medicare statutes: 42 U.S.C. § 1395y(a)(1)(A), which prohibited payments for medical procedures that were "not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member," and 42 U.S.C. § 1320c-5(a), which mandated a qualitative standard of care. *Mikes*, 274 F.3d at 700-01. The court held "that in submitting a Medicare reimbursement form, a defendant implicitly certifies compliance with § 1395y(a)(1)(A), but not § 1320c-5(a)." *Id.* at 702. The court reasoned that, in the Medicare context, "implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." *Id.* at 700 (emphasis in original). Section 1395y(1)(A) expressly conditioned payment on compliance; however, § 1320c-5(a) did not because it established "conditions of *participation*, rather than prerequisites to receiving *reimbursement*."

Id. at 701-02 (emphases added). Thus, § 1320c-5(a) established a condition of participation because it was prospective in nature, "directed at the provider's continued eligibility in the Medicare program, rather than any individual incident of noncompliance," as evidenced by its requirement that the Secretary of Health and Human Services may impose sanctions only after a peer review organization finds evidence of violations in "a substantial number of cases" and recommends sanctions. *Id.* at 702.

Although we have not addressed directly the viability of the implied false certification theory, our precedent regarding express false certification is instructive. Prior to our decision in *Hendow*, the leading case in this circuit on false certification was *Hopper*, 91 F.3d at 1266. In *Hopper*, we held that "[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Id.* Under this standard, we concluded that FCA liability cannot attach "where regulatory compliance was not a *sine qua non* of receipt of state funding." *Id.* at 1267. Thus, Hopper failed to state a viable claim where the forms on which his claims were submitted did "not contain any certification concerning regulatory compliance" and the statute at issue did "not require funding recipients to certify their compliance with federal law and regulations." *Id.*

Later, in *Hendow*, we clarified the four elements of a false certification claim: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to

pay out money or forfeit moneys due." *Hendow*, 461 F.3d at 1174. To establish the materiality element, "the false statement or course of conduct must be material to the government's decision to pay out moneys to the claimant." *Id.* at 1172. To establish materiality, we pointed out that the term "certification" had no special significance; rather, "the question is merely whether the false certification—or assertion, or statement—was relevant to the government's decision to confer a benefit." *Id.* at 1173.

The defendant in *Hendow* argued that the materiality element was not satisfied because the incentive compensation ban under Title IV and the Higher Education Act of 1965 that it allegedly violated was "merely a condition of *participation*, not a condition of *payment*," and therefore provided no basis for an FCA claim under *Mikes*. *Id.* at 1176. We reasoned that the participation-payment differentiation set forth in *Mikes* was limited to the Medicare context. We also observed that, "[i]n the context of Title IV and the Higher Education Act, if we held that conditions of participation were not conditions of payment, there would be no conditions of payment at all." *Id.* In addition, although *Mikes* required that "the underlying statute 'expressly' condition payment on compliance," we stated that our precedent contained no such limitation. *Id.* at 1177.[3]

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[3] We need not decide whether to adopt the Second Circuit's requirement in the Medicare context that "the underlying statute 'expressly' condition payment on compliance," as Ebeid's position fails regardless.

[3] The Second Circuit's analysis in *Mikes* of the implied false certification theory is persuasive and consistent with our precedent. The implied false certification theory shares common limitations with the express false certification theory as delineated in *Hopper* and *Hendow*. Express certification simply means that the entity seeking payment certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted. Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim. Under both theories, "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Hopper*, 91 F.3d at 1266. Likewise, materiality is satisfied under both theories only where compliance is "a *sine qua non* of receipt of state funding." *Id.* at 1267.

II. Pleading Standard under the False Claims Act

[4] Having established that a relator may bring a claim of implied false certification, we now turn to pleading requirements under Federal Rule of Civil Procedure 9(b), and the question of whether Ebeid has met them. "[I]n alleging fraud or mistake," Rule 9(b) requires a party to "state with particularity the circumstances constituting fraud or mistake," including "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). In addition, " '[t]he plaintiff must set

forth what is false or misleading about a statement, and why it is false.' " *Id.* (quoting *Decker v. GlenFed, Inc.* (*In re GlenFed, Inc. Sec. Litig.*), 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc)).

[5] To survive a Rule 9(b) motion to dismiss, a complaint alleging implied false certification must plead with particularity allegations that provide a reasonable basis to infer that (1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation. We do not embrace the district court's categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims to support every allegation, although we recognize that this requirement has been adopted by some of our sister circuits. *See United States ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493, 510 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 233 (1st Cir. 2004); *United States ex rel. Clausen v. Lab Corp. of Am.*, 290 F.3d 1301, 1312 n.21 (11th Cir. 2002). In our view, use of representative examples is simply one means of meeting the pleading obligation. We join the Fifth Circuit in concluding, in accord with general pleading requirements under Rule 9(b), that it is sufficient to allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually

submitted." *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).[4]

Ebeid argues that the traditional pleading standards for fraud under Rule 9(b) should be relaxed here because the alleged fraud was of an extended duration and "the billing information is solely in Lungwitz's possession." To be sure, Ebeid is not privy to the details of patient billing. As he points out, in the securities fraud context we have held that "Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence is within a defendant's exclusive possession." *Lee*, 245 F.3d at 1052 (citing *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987); *Deutsch v. Flannery*, 823 F.2d 1361, 1366 (9th Cir. 1987)). We are not persuaded that this limited principle should be applied in this case. To jettison the particularity requirement simply because it would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government.

While Ebeid is not required to allege "all facts supporting each and every instance" of billing submitted in violation of the Stark Act or the purported bar on the corporate practice of medicine, *Lee*, 245 F.3d at 1051, Rule 9(b) still requires Ebeid to plead the fraud with some level of specificity. Indeed,

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[4] Likewise, a plaintiff may, but need not, provide representative examples to establish the payment element of the prima facie case. The rule 9(b) standard may be satisfied by pleading with particularity a reasonable basis to infer that the government either paid money or forfeited moneys due.

even under a relaxed standard, Ebeid must provide enough detail "to give [Lungwitz] notice of the particular misconduct which is alleged to constitute the fraud charged so that [she] can defend against the charge and not just deny that [she has] done anything wrong." *Lee*, 245 F.3d at 1051-52 (citing *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993)). Ebeid must also supply reasonable indicia that false claims were actually submitted. The Second Amended Complaint does neither.

III. EBEID'S SECOND AMENDED COMPLAINT

Although Ebeid's Second Amended Complaint invokes the framework of an implied false certification claim,[5] it fails to plead this claim with the particularity required by Rule 9(b). Ebeid alleges that "the United States would not have paid" the submitted claims had it known of Lungwitz's non-compliance with various state and federal laws. Ebeid alleges that Lungwitz violated the Arizona common law prohibition on the corporate practice of medicine, the Stark Act, 42 U.S.C. § 1395nn, and certain Medicare regulations contained in 42 C.F.R. Part 424, Subpart B. To the extent that any of these laws may form the basis for an implied false certification, Ebeid still fails to "state with particularity the circumstances constituting fraud or mistake," as required by Rule 9(b).

---

[5] The Second Amended Complaint does not use the phrase "implied false certification" but it sufficiently raises this theory through allegations that the government paid claims because it believed Lungwitz was in compliance with laws upon which payment was conditioned. *See Hendow*, 461 F.3d at 1173 (explaining that the term "certification" has no special significance).

A. Corporate Practice of Medicine

[6] Ebeid alleges that the claims submitted to the government were false because the health care businesses "were engaged in the unlawful corporate practice of medicine." The Second Amended Complaint does not refer to any statute, rule, regulation, or contract that conditions payment on compliance with state law governing the corporate practice of medicine. Instead, Ebeid baldly asserts that had Lungwitz "not concealed or failed to disclose information affecting the right to payment, the United States would not have paid the claims." This conclusory allegation is insufficient under Rule 9(b).

B. Stark Act

[7] Ebeid also alleges that Lungwitz falsely implied compliance with the Stark Act. The Stark Act generally prohibits a physician from referring Medicare patients to entities in which the physician has a prohibited "financial interest." *See* 42 U.S.C. § 1395nn(a)(1). Although the Stark Act may provide a valid basis from which to imply certification, because it expressly conditions payment on compliance, 42 U.S.C. § 1395nn(g)(1) ("No payment may be made under this subchapter for a designated health service which is provided in violation of subsection (a)(1) of this section."),[6] Ebeid simply alleges that Lungwitz

---

[6] Unlike 42 U.S.C. § 1320c-5(a), which the court in *Mikes* found insufficient as the basis of an implied certification claim, the Stark Act does not require continuous or numerous violations before a practitioner can be excluded from providing reimbursable services; rather, the Stark Act prohibits providers from submitting claims, or the government from paying claims, for

"concealed and failed to disclose that the Clinic's physicians had a financial relationship to the Home Health Care Agency and the Hospice to which the physicians referred patients." The only clarification given is that allegedly unlawful "referrals . . . were made by physicians who were employed by and whose livelihood depended upon Lungwitz." These general allegations—lacking any details or facts setting out the "who, what, when, where, and how" of the "financial relationship" or alleged referrals—are insufficient under Rule 9(b). *Vess*, 317 F.3d at 1106. As with the corporate practice of medicine claims, a global indictment of Lungwitz's business is not enough.

C. Medicare Regulations

Related to the alleged Stark Act violations, Ebeid alleges that Lungwitz submitted claims for reimbursement while Lungwitz "and employee physicians had a significant financial or contractual interest in the referral of patients from the Clinic to the Home Health Care Agency and Hospice in violation of 42 C.F.R. [Part] 424, Subpart B."

Of the ten sections in Part 424, Subpart B of the Medicare regulations, Ebeid alleges a violation only of § 424.22, directed to home health services, which provides in relevant part:

"services furnished pursuant to a [prohibited] referral." 42 U.S.C. § 1395nn(a)(1)(B) & (g)(1). Accordingly, a plausible allegation of failure to comply with the Stark Act, stated with sufficient particularity to meet the requirements of Rule 9(b), might support a claim of implied false certification. Ebeid, however, fails to meet the threshold requirement of particularity.

> Medicare . . . pays for home health services only if a physician certifies and recertifies the content specified in paragraphs (a)(1) and (b)(2) of this section, as appropriate.
>
> . . . .
>
> (d) A physician who has a financial relationship, as defined at § 411.354 of this chapter, with a [home health agency ("HHA")] may not certify or recertify the need for home health services or establish or review a plan of treatment for the HHA unless the financial relationship satisfies the requirements of one of the exceptions set forth in § 411.355 through § 411.357 of this chapter.

42 C.F.R. § 424.22.

Like the Stark Act, § 424.22(d) may serve as the basis for an implied false certification because it provides a condition of payment, not participation. Although Part 424 is entitled "Conditions for Medicare Payment," our analysis does not rest on the title. Instead we look to the specific text of the regulation, which provides that "Medicare . . . pays for home health services *only* if a physician certifies and recertifies" the need for home health care services. 42 C.F.R. § 424.22 (emphasis added). A physician in a prohibited financial relationship may not certify or recertify such need. *Id.* § 424.22(d). Therefore, certification of compliance with the ban on financial relationships prohibited under § 424.22(d) may be inferred by the submission of a related Medicare claim for home health care services.

[8] Ebeid alleges that Lungwitz and Irby "owned, controlled, and profited from" the health care businesses. Because referrals from the Clinic to the Home Health Care Agency "were made by physicians who were employed by and whose livelihood depended upon Lungwitz and/or Irby," Ebeid maintains that those referrals were made unlawful by "financial and contractual relationship between [Lungwitz] and the physicians." Although § 424.22(d) provides a sufficient basis for implying certification, Ebeid's Second Amended Complaint fails to plead such a theory with the particularity required by Rule 9(b) for the same reasons germane to the alleged Stark Act violation.

CONCLUSION

Although Ebeid articulates the framework of a claim for implied false certification, he fails to plead it with the particularity required of Rule 9(b). We affirm the district court's order dismissing the Second Amended Complaint with prejudice.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 08-544-PHX-SRB

[Filed May 22, 2009]

United States of America ex rel. Sadek R. Ebeid, M.D.,

Plaintiff,

vs.

Theresa A. Lungwitz and Mrs. Edward C. Irby, individually and dba Health Resource Center; Home Health Resources, Inc.; The Crossing: Hospice Care, Inc.; The Crossing Hospice Foundation, Inc.; Thema, LLC; Thema Management Company; All Hearts Private Duty LLC; A+ Urgent Care, LLC; Donna Tomich dba EDI; J. Does 1-20; ABC Business Entities 1-20,

Defendants.

ORDER

At issue is Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint ("Defs.' Mot.") (Doc. 48).

I. Background

Qui tam relator[1] Sadek R. Ebeid, M.D. ("Plaintiff"), is a private practice physician licensed to practice medicine in the State of Arizona. (Second Am. Compl. ("SAC") ¶ 3; Defs.' Mot. at 2.) Defendant Theresa Lungwitz is the owner of Defendant Health Resource Center, LLC (the "Clinic"), Defendant Home Health Resources, Inc. (the "Home Health Care Agency"), and Defendant The Crossing Hospice Care, Inc. (the "Hospice"). (SAC ¶¶ 5, 7-9; Defs.' Mot. at 2.) Defendant Mrs. Edward C. Irby is an individual alleged to have worked with Defendant Lungwitz. (SAC ¶ 6.) Other than a billing professional with whom both Plaintiff and Defendants independently contracted, there do not appear to be any links between the parties. (Defs.' Mot. at 2 & n.2.)

The False Claims Act ("FCA") permits individuals to bring fraud actions on behalf of themselves and the U.S. government and to retain a portion of any recovery. 31 U.S.C. § 3730(b). The *qui tam* provisions in the FCA were intended to help the government root out fraud and abuse "by unleashing a posse of *ad hoc*

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[1] "*Qui tam*" is an abbreviation for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which literally means, "who as well for the king as for himself sues in this matter." Black's Law Dictionary 1262 (7th ed. 1999).

deputies to uncover and prosecute frauds against the government." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (quotation and citation omitted). Pursuant to the FCA, Plaintiff filed his original complaint under seal and only served it on the U.S. Attorney for the District of Arizona. (Doc. 4.) On October 1, 2008, the U.S. government notified the Court of its decision not to intervene in this case, and the First Amended Complaint was subsequently served on Defendants. (*See* Docs. 13, 14.) Plaintiff filed his SAC on February 2, 2009, alleging two causes of action under the FCA. (SAC ¶¶ 20-35.)

Plaintiff alleges that Defendants, through the operation of the Clinic, have engaged in the unlawful corporate practice of medicine.[2] (SAC ¶ 14.) The SAC states that the individual Defendants, who are not physicians, have unlawfully directly employed physicians, while owning and operating "virtually every aspect of the Clinic's operations." (*Id.*) Plaintiff alleges that Defendants "assumed responsibility for billing the physicians' services and engaged in unlawful fee splitting with the Defendants." (*Id.*) The SAC also states that "Plaintiff is informed and believes that the Clinic is owned by a secret Limited Liability Company created to unlawfully benefit Defendants and the corporate practice of medicine." (*Id.*) As a result of these activities, Plaintiff alleges, "all billings generated by the Clinic and its employee physicians

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[2] The Court resolves Defendants' Motion on the grounds that the SAC does not comply with Rule 9(b) of the Federal Rule of Civil Procedure. Therefore, the parties' arguments about the continued viability of the Arizona common law doctrine of unlawful practice of medicine subsequent to the enactment of Arizona Revised Statutes § 10-2213(C) will not be addressed.

were and are unlawful." (SAC ¶ 15.) Plaintiff contends that these billings constitute false claims under the FCA "because the Defendants made knowing and willful misrepresentations of fact and or [*sic*] knowingly concealed or failed to disclose information affecting the right to payment." (SAC ¶ 24.)

Plaintiff also states that, for at least 10 years, the Clinic has referred patients to the Home Health Care Agency and the Hospice. (SAC ¶ 16.) The SAC explains that the Clinic's employee physicians certified that certain patients were in need of home health care or hospice services, and since the physicians were participating in the unlawful corporate practice of medicine, the referrals and all billings were also unlawful. (*Id.*) Plaintiff states that the referrals were illegal because the Defendants and the employee physicians "had a significant financial or contractual interest in the referral of patients from the Clinic to the Home Health Care Agency and Hospice . . . ." (SAC ¶ 25.) The SAC also alleges that Defendants "unlawfully obtained a provider number because the Clinic was at least partially owned by a Delaware Limited Liability Company and that ownership interest was never disclosed to Medicare . . . ." (*Id.*) Plaintiff further alleges that the referrals were made by physicians "who were employed by and whose livelihood depended on Lungwitz and/or Irby," thus rendering them illegal under anti-kickback laws. (SAC ¶¶ 18, 31.) Defendants have moved to dismiss the SAC pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. (Defs.' Mot. at 1.)

II. Legal Standards and Analysis

A. Plaintiff Has Failed to Plead His Claims with Particularity, as Required by Rule 9(b).

For claims involving fraud, Rule 9(b) imposes additional pleading requirements: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This heightened pleading requirement:

> serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also "to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (quoting *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)). Complaints filed under the FCA, an anti-fraud statute, must meet the requirements of Rule 9(b). *Id. See also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 228 (1st Cir. 2004) (collecting cases from the Second, Third, Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuit Courts of Appeals, all of which held that complaints brought under the FCA must satisfy the requirements of Rule 9(b)); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552 (D.C. Cir. 2002) ("Every circuit to consider the issue has held

that, because the False Claims Act is self-evidently an anti-fraud statute, complaints brought under it must comply with Rule 9(b)."(citing *Bly-Magee*, 236 F.3d at 1018; *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995))).

A Rule 9(b) motion to dismiss for failure to plead with particularity is the functional equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). "[D]ismissals under the two rules are treated in the same manner." *Id.* Accordingly, factual allegations need to be "plausible" and "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Liability under the FCA attaches not to the underlying fraudulent scheme, but to the submission of the false claim itself. *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002). *See alsoUnited States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (holding that evidence of an actual false claim is "the *sine qua non* of a False Claims Act violation"). Therefore, to state a claim for relief under the FCA, Plaintiff must allege facts that plausibly establish that "(1) [Defendants] made a claim against the United States (2) that was false or fraudulent (3) with knowledge of the falsity or fraud." *Aflatooni*, 314 F.3d at 1000 (citing *United States ex rel.*

Oliver v. Parsons Co., 195 F.3d 457, 461(9th Cir. 1999)).[3]

The heightened pleading requirement of Rule 9(b) applies to each element of a claim under the FCA, except that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). To survive Defendants' Motion to Dismiss, the SAC must include the "'who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). However, Rule 9(b) does not require Plaintiff "to allege, in detail, all facts supporting each and every instance of [fraud] over a multi-year period." *United States ex rel Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001). The Sixth Circuit Court of Appeals has held, "[W]here a relator pleads a complex and

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[3] The FCA provides, in pertinent part, that any person who:
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
(3) conspires to defraud the Government by getting a false or fraudulent claim paid; . . .
(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10, 000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . [.]
31 U.S.C. § 3729(a).

far-reaching fraudulent scheme with particularity, and provides examples of specific false claims submitted to the government pursuant to that scheme, a relator may proceed to discovery on the entire fraudulent scheme." *United States ex rel. Blesdoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007). In such a case, "the claims that are pled with specificity must be characteristic examples that are illustrative of the class of all claims covered by the fraudulent scheme." *Id.* at 510-11 (quotations and citation omitted); *accord United States ex rel. Sallade v. Orbital Sciences Corp.*, No. CV 05-604-PHX-NVW, 2008 WL 114888, at *4 (D. Ariz. Jan. 4, 2008).

Plaintiff alleges that Defendants violated the FCA by knowingly and voluntarily submitting false Medicare claims to the U.S. government. (SAC ¶¶ 21, 23-24.) Plaintiff alleges that the claims "were false because the Defendants made knowing and willful misrepresentations of fact and or knowingly concealed or failed to disclose information affecting the right to payment." (SAC ¶ 24.) The SAC further states that the alleged misrepresentations of fact included, but were not limited to, false certifications that patients were homebound. (SAC ¶ 25.) Plaintiff alleges that Defendants also concealed or failed to disclose the fact that Defendants and their employee physicians "were engaged in the unlawful corporate practice of medicine," that Defendants and their employee physicians "had a significant financial or contractual interest in the referral of patients from the Clinic to the Home Health Care Agency and Hospice," that Defendants and the employee physicians were engaging in unlawful fee splitting, and that Defendants unlawfully obtained a provider number because they did not disclose that the Clinic was

partially owned by a Delaware Limited Liability Company. (*Id.*) Plaintiff also claims that Defendants violated 42 U.S.C. § 1395nn, commonly known as the Stark Law, "and other provisions of federal law," which prohibit doctors from referring patients to an entity with which the physician has a financial relationship. (SAC ¶ 31.) Plaintiff alleges that this violation constitutes a separate claim for relief under the FCA. (SAC ¶¶ 30-35.)

As explained above, courts have repeatedly held that the essence of a *qui tam* case under the FCA is an actual false claim. *See, e.g.*, *Aflatooni*, 314 F.3d at 1002 (explaining that the plaintiff must establish that a false claim was submitted to the government, as it is not enough to generally allege that a fraudulent scheme existed); *Clausen*, 290 F.3d at 1311 (holding that evidence of an actual false claim is "the *sine qua non* of a False Claims Act violation"); *United States ex rel. Frazier v. IASIS Healthcare Corp.*, 554 F. Supp. 2d 966, 971 (D. Ariz. 2008) ("A FCA plaintiff cannot prevail by describing in detail a private scheme that violates laws and regulations. The plaintiff must establish that a false claim was actually submitted to the government." (citations omitted)). The FCA was enacted during the Civil War to combat rampant fraud in wartime defense contracts. *See* S. REP. NO. 99-345, at 8 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5273 (summary of legislative history offered in connection with amendment of the FCA in 1986). The government is able to recover under the FCA regardless of whether it suffered damage; recovery is based "solely upon proof that false claims were made." *Id.* "[A] false claim may take many forms, the most common being a claim for goods or services not provided." *Id.* at 9, 1986 U.S.C.C.A.N. at 5274. The

need for specific allegations of a false claim bolsters the requirements of Rule 9(b) pleading and the goal of "giv[ing] notice to defendants of the specific fraudulent conduct against which they must defend." *Bly-Magee*, 236 F.3d at 1018.

Plaintiff has not alleged any specific facts about particular transactions he believes to have been fraudulent. Instead, the SAC describes a scheme of unlawful corporate practice of medicine and self-dealing spanning at least 10 years, which, according to Plaintiff, means that "all billings generated by the Clinic and its employee physicians were and are unlawful." (SAC ¶¶ 14-19; Pl.'s Opp'n to Defs.' Mot. ("Pl.'s Opp'n") at 8-10.) The SAC also alleges, "Because of the financial and contractual relationship between the Defendants and the physicians, the referrals to the Home Health Care Agency and the Hospice were unlawful." (SAC ¶ 19.) "Violations of laws and regulations alone do not create a cause of action under the FCA." *Frazier*, 554 F. Supp. 2d at 971. "What constitutes the FCA offense is the knowing presentation of a claim that is either fraudulent or simply false." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996). "The False Claims Act, then, focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme." *Aflatooni*, 314 F.3d at 1001 (citing *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)). *See also Karvelas*, 360 F.3d at 232 (explaining that underlying schemes and other wrongful activity, including violations of other laws and regulations, must be pled with particularity *and* "linked to allegations, stated with particularity, of the actual false claims submitted to the government that

constitute the essential element of an FCA qui tam action"); *Frazier*, 554 F. Supp. 2d at 973 ("[M]erely alleging a violation of the Stark Law and/or Anti-Kickback Statute does not sufficiently state a claim under the FCA." (citing *Hopper*, 91 F.3d at 1266)).

Plaintiff argues that "to attach or describe every single claim submitted or referral made during [the 10 years at issue] would make the SAC stretch from the ground to the ceiling of the courthouse[.]" (Pl.'s Opp'n at 9-10.) While it might be impractical to describe *every* claim that allegedly violates the FCA, Plaintiff would need to have described at least one specific claim in order to satisfy Rule 9(b) and explained how Defendants' alleged actions constituted a false claim. For example, Plaintiff has not provided sufficient detail on the "who, what, when, where, and how" of his claims. With respect to "who," Plaintiff states that "*Defendants* are the ones who failed to disclose certain information to Medicare." (Pl.'s Opp'n at 8.) However, as Defendants point out, "Given that three of the Defendants are corporate entities, each of which has employed numerous individuals during its existence, Plaintiff's vague assertion does not pass muster under Rule 9(b)." (Defs.' Reply in Supp. of Defs.' Mot. ("Defs.' Reply") at 3.) Similarly, the SAC is devoid of other crucial details of the actual allegedly false claims, merely stating generally that these claims took place over the course of 10 years ("when"), in Phoenix, Arizona ("where"), along with repeated assertions about the unlawful corporate practice of medicine. (*See, e.g.*, SAC ¶¶ 2, 14, 16; Pl.'s Opp'n at 8-9.) These facts are too vague to comply with the particularly requirements for fraud claims. The Court concludes that, because no specific allegations are made

regarding a particular false claim or claims, the SAC does not comport with the requirements of Rule 9(b).

B. The Court Will Not Relax the Requirements of Rule 9(b) in this Case.

In the alternative, Plaintiff argues that "the pleading requirements should be relaxed because Ebeid alleges a long running scheme to bilk the Medicare program[,] and the facts of the alleged scheme are particularly within the Defendants' knowledge or control." (Pl.'s Opp'n at 10.) Plaintiff argues that he is entitled to this more lenient standard because the alleged scheme took place over a period of at least 10 years, and all relevant documents such as patient charts and claim forms are in the possession of Defendants. (Pl.'s Opp'n at 10-11.) Courts have applied a less stringent version of the Rule 9(b) requirements in certain special circumstances. "Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence of fraud is within a defendant's exclusive possession." *Lee*, 245 F.3d at 1052 (citing *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987); *Deutsch v. Flannery*, 823 F.2d 1361, 1366 (9th Cir. 1987)).

The Court is not persuaded that the requirements of Rule 9(b) should be relaxed in this case.[4] Even viewing Plaintiff's SAC in a more lenient light with respect to particularity, though, the FCA claims are

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[4] For one thing, Plaintiff's assertions that the necessary information is exclusively within Defendants' control conflicts with his allegation that he is the "original source" of the facts alleged in the SAC. (SAC ¶ 4.)

still deficient. Plaintiff might not be required to identify every claim Defendants made for Medicare payments and every detail of the alleged wrongdoing, but the SAC must still be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Lee*, 245 F.3d at 1051-52 (quoting *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993)). Here, the SAC alleges in a sweeping manner that all claims made by Defendants over the last 10 years were necessarily fraudulent. Plaintiff does not specifically allege that Defendants at any time stated that they were in compliance with any laws or regulations that they were, in fact, violating. Plaintiff alleges that physicians employed by Defendants certified that referrals of patients from the Clinic to the Home Health Care Agency and the Hospice were "medically necessary," and that those certifications were unlawful because of the allegedly illegal corporate structure of the entities. (SAC ¶ 16.) However, as detailed above, an underlying scheme cannot be the basis of a FCA claim. Plaintiff has not identified a particular referral or certification that he knows or believes to be false, much less described the source or extent of his knowledge. *See California ex rel. Mueller v. Walgreen Corp.*, 175 F.R.D. 631, 635-36 (N.D. Cal. 1997).

III. Conclusion

As Plaintiff fails to allege any facts with particularity that go to the submission of actual false claims to the U.S. government, he has not met his burden under Rule 9(b). Furthermore, legal and

regulatory violations alone cannot constitute a claim under the FCA.

IT IS THEREFORE ORDERED granting Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 48) and dismissing the Second Amended Complaint.

IT IS FURTHER ORDERED vacating the discovery dispute hearing, the pretrial conference and the trial date.

IT IS FURTHER ORDERED denying as moot the Stipulated Protective Order (doc. 76).

DATED this 22nd day of May, 2009.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV 08-544-PHX-SRB

[Filed May 22, 2009]

UNITED STATES OF AMERICA ex rel. Sadek R. Ebeid, M.D.,	)
Plaintiff,	)
v.	)
THERESA A. LUNGWITZ, et al.,	)
Defendants.	)

JUDGMENT IN A CIVIL CASE

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the Court's Order of May 22, 2009, that judgment is entered in favor of defendants and against plaintiff. Plaintiff to take nothing, and action is terminated.

RICHARD H. WEARE
District Court
May 20, 2009 Executive/Clerk

By: s/ D. Taylor
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-16122
D.C. No. 2:08-cv-00544-SRB
District of Arizona, Phoenix

[Filed August 26, 2010]

SADEK R. EBEID, M.D., ex rel. United States of America,	)
Plaintiff - Appellant,	)
v.	)
THERESA A. LUNGWITZ; EDWARD C. IRBY (MRS.), individually and AKA Margaret Irby, DBA Health Resource Center; HOME HEALTH RESOURCES, INC., an Arizona corporation; THE CROSSING HOSPICE CARE, INC., an Arizona corporation,	)
Defendants - Appellees.	)

Before: WALLACE, GRABER and McKEOWN, Circuit Judges.

ORDER

The petition for panel rehearing is denied.

APPENDIX D

FEDERAL FALSE CLAIMS ACT

31 USC 3729-3733

(Updated August 2010 incorporating passage of Pub. L. No. 111-203, 124 Stat. 1376)

§ 3729. False claims

(a) Liability for Certain Acts.

(1) In general. Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the

Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410 [1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages. If the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions. For purposes of this section--

(1) the terms "knowing" and "knowingly"--

(A) mean that a person, with respect to information--

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"--

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure. Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986. [26 USCS §§ 1 et seq.].

(e) [Redesignated]

HISTORY:

(Sept, 13, 1982, P.L. 97-256, § 1, 96 Stat. 978; Oct. 27, 1986, P.L. 99-562, § 2, 100 Stat. 3153; July 5, 1994, P.L. 103-272, § 4(f)(1)(O), 108 Stat. 1362.)

(As amended May 20, 2009, P.L. 111-21, § 4(a), 123 Stat. 1621.)

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States

Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to qui tam Actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would

interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an

amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed– (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph,

"original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transaction, and who has voluntarily provided the information to the Government before filing an action under this section.'"

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412 (d) of title 28 shall apply.

(h) Relief from Retaliatory actions.

(1) In general. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief. Relief under paragraph (1) shall include reinstatement with the same seniority status that

employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on Bringing Civil Action. A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

HISTORY:

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 978; Oct. 27, 1986, P.L. 99-562, §§ 3, 4, 100 Stat. 3154, 3157; Nov. 19, 1988, P.L. 100-700, § 9, 102 Stat. 4638; May 4, 1990, P.L. 101-280, § 10 (a), 104 Stat. 162; July 5, 1994, P.L. 103-272, § 4(f)(1)(P), 108 Stat. 1362.)

(As amended May 20, 2009, P.L. 111-21, § 4(d), 123 Stat. 1624.)

(As amended March 23, 2010, P.L. 111-148, § 10104.)

§ 3731. False claims procedure

(a) A subpena [subpoena] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding

charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

HISTORY:

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 979; Oct. 27, 1986, P.L. 99-562, § 5, 100 Stat. 3158.)

(As amended May 20, 2009, P.L. 111-21, § 4(b), 123 Stat. 1623.)

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under State law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) Service on State or local authorities. With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

HISTORY

(Added Oct. 27, 1986, P.L. 99-562, § 6(a), 100 Stat. 3158.)

(As amended May 20, 2009, P.L. 111-21, § 4(e), 123 Stat. 1625.)

§ 3733. Civil investigative demands

(a) In general.

(1) Issuance and service. Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under

section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act [1] investigation.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(C) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) Protected material or information.

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to

invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing

agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between

the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before

whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or

the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such

witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18. [18 USCS §§ 6001 et seq.].

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the

same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any

such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return

date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this

subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A); and

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

HISTORY:

(Added Oct. 27, 1986, P.L. 99-562, § 6(a), 100 Stat. 3159.) (As amended May 20, 2009, P.L. 111-21, § 4(c), 123 Stat. 1623.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV'08 544PHX SRB
Assigned For All Purposes to
Honorable Susan R. Bolton

[Filed January 14, 2009]

UNITED STATES OF AMERICA Ex rel SADEK R. EBEID, M.D.	)
Plaintiff	)
vs	)
THERESA A . LUNGWITZ and MRS. EDWARD C. IRBY aka MARGARET IRBY, individually and dba HEALTH RESOURCE CENTER; HOME HEALTH RESOURCES, INC.; THE CROSSING; HOSPICE CARE, INC.; Arizona Corporations,	)
Defendants.	)

PROPOSED SECOND AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

Plaintiff UNITED STATES OF AMERICA ex rel. SADEK R. EBEID, M.D. (the "Plaintiff") respectfully alleges as follows:

I.

JURISDICTION AND VENUE

1. Plaintiff brings this action under the provisions of 31 U.S.C. § 3729 *et seq* (the False Claims Act), 42 U.S.C. § 1395nn (the Stark Law) and 42 C.F.R. § 424 subpart B which is a federal regulation prohibiting certain physician referrals. Plaintiff also brings this action under 42 U.S.C. §§ 1124 and 1124A which obligates Medicare providers to disclose the identities of all persons and entities with an interest in the provider. As such, this Court has original subject matter jurisdiction over this matter under 28 U.S.C. §§ 1345 and 1331. Plaintiff files this Second Amended Complaint under seal under the provisions of 31 U.S.C. 3730(b)(2).

2. Venue is appropriate in this judicial district under 31 U.S.C. § 3730 in that at least one of the Defendants resides in/or transacts business in this judicial district and all the acts alleged below as violations of law occurred in this judicial district.

II.

PARTIES

A. The Plaintiff

3. Plaintiff, SADEK R. EBEID, M.D. ("Ebeid") is a medical doctor licensed to practice medicine in the State of Arizona and at all pertinent times was practicing medicine in this judicial district. Ebeid brings this action on his own behalf and also on behalf of the United States.

4. Ebeid is the original source of the information alleged below as violations of law and properly initiates this action as Relator under 31 U.S.C. § 3730. Prior to or contemporaneous with the filing of the original complaint and this Second Amended Complaint, Ebeid made written disclosure to the Government of substantially all evidence and information in Ebeid's possession.

B. The Defendants

5. Defendant, THERESA A. LUNGWITZ ("Lungwitz") is an individual who at all pertinent times resided and transacted business in this judicial district. Lungwitz's business was conducted on her own behalf and through purported corporate entities or entities of other purported legal status. As will be more fully described below, Lungwitz's business was the delivery of and billing for health care services in a manner which was unlawful.

6. Defendant, MRS. EDWARD C. IRBY aka MARGARET IRBY ("Irby") is an individual who at all

pertinent times resided and transacted business in this judicial district. Irby's business was conducted on her own behalf, in concert with Lungwitz and through purported corporate entities or entities of other purported legal status. As will be more fully described below, Irby's business was the delivery of and billing for health care services in a manner which was unlawful.

7. Defendant, HEALTH RESOURCE CENTER (the "Clinic") is a medical clinic located and operating in and about the City of Phoenix, State of Arizona. Plaintiff is unaware of the true legal status of the Clinic but alleges on information and belief that the Clinic is a sole proprietorship owned and operated by Lungwitz and Irby and/or that Lungwitz and Irby do business under the Clinic's name and/or the Clinic is owned by a secret Limited Liability Company created under the laws of Delaware but the identity of which is known to Plaintiff.

8. Defendant, HOME HEALTH RESOURCES, INC. (the "Home Health Care Agency") purports to be a general business corporation organized and existing under the laws of the State of Arizona and at all pertinent times transacted business in this judicial district. As will be more fully explained below, the Home Health Care Agency's business was the delivery of nursing and other home health care services. The nursing and other services were purportedly medically necessary and the patients were purportedly homebound. Also, as will be more fully explained below, the delivery of and billing for such services was unlawful.

9. Defendant, THE CROSSING HOSPICE CARE, INC. (the "Hospice") purports to be a general business corporation organized and existing under the laws of the State of Arizona and at all pertinent times transacted business in this judicial district. As will be more fully explained below, the Hospice's business was the delivery of and billing for Hospice services in a manner which was unlawful.

10. Plaintiff alleges that Lungwitz, Irby, the Clinic, the Home Health Care Agency, and the Hospice were at all times the agent, servant, alter-ego, employer/employee or legal representative of one another such that each Defendant is legally responsible for the acts of the others. Plaintiff also alleges that the Home Health Care Agency and the Hospice and the other Defendants co-mingled funds, failed to observe corporate formalities, had commonality of ownership, exceeded their authority under law and committed other acts such that disregard of any corporate structure or protection would be just and reasonable.

11. Neither Lungwitz nor Irby have ever been licensed as a physician in any state and neither the Clinic nor the Home Health Care Agency nor the Hospice has ever been a professional corporation. The Clinic has never held any license entitling it to deliver health care services.

III.

BACKGROUND ALLEGATIONS

A. The Unlawful Corporate Practice of Medicine

12. The corporate practice of medicine is prohibited in the State of Arizona. The United States also prohibits the corporate practice of medicine when the United States is the payor for health care services. The corporate practice of medicine occurs when a physician relinquishes a significant amount of control over the physician's practice. Such relinquishment of control occurs when a physician is employed by a non-physician or non-professional corporation; this relationship is unlawful in the State of Arizona.

13. The relinquishment of control as described above also occurs when a physician cedes management responsibilities of a practice to a non-physician or non-professional corporation by ceding responsibility for: billing, the hiring or firing of staff, the ownership interest in equipment and the physical space in which the practice operates, and by illegally splitting fees collected after providing health care services. Under those circumstances, the medical necessity for such services becomes highly suspect.

14. Beginning on a date unknown to Plaintiff and continuing to the present time, the Defendants through operation of the Clinic have engaged in the unlawful corporate practice of medicine. Most notably, the Defendants have unlawfully so engaged by the direct employment of physicians to work in the Clinic. In addition, the Defendants, not the physicians owned and operated virtually every aspect of the Clinic's

operation. For example, the Defendants placed advertisements in printed media and hired and fired physicians; the Defendants owned or leased the premises where the Clinic is located; the Defendants owned or leased all the equipment utilized by the Clinic; the Defendants were responsible for payment of the Clinic's utility bills and all other accounts payable; the Defendants assumed responsibility for billing for the physicians' services and engaged in unlawful fee splitting with the Defendants. Moreover, Plaintiff is informed and believes that the Clinic is owned by a secret Limited Liability Company created to unlawfully benefit Defendants and the corporate practice of medicine. The above list is set forth by way of example and is not exhaustive.

15. Because Defendants engaged in the unlawful corporate practice of medicine, all billings generated by the Clinic and its employee physicians were and are unlawful.

16. In addition, for at least ten years, the Clinic has referred patients to the Home Health Care Agency and Hospice for services provided by such entities. Such referrals were only accomplished after the Clinic's employee physicians certified such care was medically necessary and that the patients were confined to home or otherwise in need of hospice care. Since the certifying physicians were participating in the corporate practice of medicine, unlawful under Arizona and federal law, the referrals and all billings generated by the Home Health Care Agency and Hospice for treating such referred patients were and are unlawful.

B. The Unlawful Financial Interest of the Employee Physicians, Lungwitz, and Irby

17. As alleged above, the employee physicians of the Clinic referred Clinic patients to the Home Health Care Agency after purporting to certify that the patients were homebound and were in need of home health care services. In the same manner, referrals were made by employee physicians of patients to the Hospice after the physicians purported to certify that the patients were in need of Hospice care.

18. The referrals described above were made by physicians who were employed by and whose livelihood depended upon Lungwitz and/or Irby, the person or persons who owned, controlled and profited from the Home Health Care Agency, Hospice, and Clinic.

19. Because of the financial and contractual relationship between the Defendants and the physicians, the referrals to the Home Health Care Agency and the Hospice were unlawful.

IV.

FIRST CAUSE FOR RELIEF

(Under the False Claim Act Licensure and Financial Interest Violation Against All Defendants)

20. Plaintiff realleges as if fully set forth below all the allegations contained in paragraphs 1 through 19 of this Second Amended Complaint.

21. Commencing on a date unknown to Plaintiff and continuing to the present time, Defendants have

presented claims for payment or approval of payment (the "Claims") to an officer employee or representative of the United States Government. The claims were submitted to a Government program called MediCare, which provides coverage for health care services provided to eligible beneficiaries.

22. The Claims sought and demanded payment for health care services provided by the Clinic, the Home Health Care Agency, the Hospice and its employees.

23. Defendants submitted the Claims knowingly and voluntarily.

24. The Claims submitted by Defendants were false. The Claims were false because the Defendants made knowing and willful misrepresentations of fact and or knowingly concealed or failed to disclose information affecting the right to payment. Some of the false claims relate to services provided at the Clinic only. Others relate to services provided by the Clinic and then services provided by the Home Health Care Agency and Hospice after referral of patients by employee physicians of the Clinic.

25. The misrepresentations of fact contained in the Claims, included (but are not limited to) false certifications that patients were homebound entitling the patient to MediCare coverage for home health care and that such care was medically necessary. The information concealed or not disclosed in the Claims included (but is not limited to) that: (1) the Defendants and the employee physicians were engaged in the unlawful corporate practice of medicine; (2) the Defendants and employee physicians had a significant financial or contractual interest in the referral of

patients from the Clinic to the Home Health Care Agency and Hospice in violation of various federal laws including 42 C.F.R. 424, Subpart B; (3) the Defendants and the employee physicians were engaging in unlawful fee splitting; and (4) the Defendants unlawfully obtained a provider number because the Clinic was at least partially owned by a Delaware Limited Liability Company and that ownership interest was never disclosed to Medicare in violation of 42 U.S.C. §§ 1124 and 1124A.

26. The United States reasonably relied on the information contained in the Claims.

27. As a direct and proximate result of the falsity of the Claims as alleged above, the United States paid the Claims. Had the true facts been known or had the Defendants not concealed or failed to disclose information affecting the right to payment, the United States would not have paid the claims.

28. As a further direct and proximate result of the falsity of the Claims, the United States has suffered damages at least equal to the total amount of payment made on the Claims by the United States.

29. In addition to damages, the United States is entitled to civil penalties equal to treble the measure of actual damages alleged above, and a fine ranging from $5,000 to $10,000 for each false claim. Plaintiff is also entitled to attorneys' fees and costs incurred in prosecution of this action and the Court should order that Relator share in such damages, civil penalties, attorneys' fees and costs as allowed by law.

V.

SECOND CLAIM FOR RELIEF

(Under the False Claims Act Stark Law Violation Against All Defendants)

30. Plaintiff realleges as if fully set forth below all the allegations contained in paragraphs 1 through 19 and 21 through 29 of this Second Amended Complaint.

31. Plaintiff alleges that 42 U.S.C. § 1395nn - the Stark Prohibition of Self-Referral - and other provisions of federal law make it unlawful for a physician to refer patients to an entity in which the physician has a financial relationship and also makes it unlawful for the entity to submit a claim for payment to the United States or other payor for health care services rendered to the referred patients.

32. The Claims submitted by Defendants were false because the Defendants concealed and failed to disclose that the Clinic's physicians had a financial relationship to the Home Health Care Agency and the Hospice to which the physicians referred patients.

33. The false claims directly and proximately caused the United States damage because had the United States known about the financial linkage and relationship between the Clinic's physicians and the Defendants, the Claims would not have been paid.

34. The damages suffered by the United States are equal to the total amount paid by the Government on all false claims.

35. In addition the United States is entitled to civil penalties equal to treble the amount of damages and a fine equal to $5,000 to $10,000 for each false claim. Plaintiff is also entitled to attorneys' fees and costs incurred in prosecution of this action and the Court should order that Relator share in such damages, civil penalties, attorneys' fees and costs according to law.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

ON BOTH CLAIMS FOR RELIEF

A. For damages equal to the entire amount of payment made by the Government on the Claims.

B. For civil penalties equal to treble the amount of damages.

C. For additional civil penalties of $10,000 for each false claim.

D. For attorneys' fees and costs.

E. For an order that Relator share in all damages, civil penalties and fines, attorneys fees and costs as allowable under law.

F. For such other relief that the Court deems just and proper under the circumstances.

Dated: January 14th, 2009.

Respectfully submitted,

LAW OFFICES OF MICHAEL J. KHOURI

By: /s/ Michael J. Khouri
MICHAEL J. KHOURI, ESQ.
Attorneys for Plaintiff
SADEK R. EBEID, M.D.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial in the above-entitled matter.
Dated: January 14th, 2009.

Respectfully submitted,

LAW OFFICES OF MICHAEL J. KHOURI

By: /s/ Michael J. Khouri
MICHAEL J. KHOURI, ESQ.
Attorneys for Plaintiff
SADEK R. EBEID, M.D.

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No. 10-461

SUPREME COURT, U.S.
NOV - 5 2010

In the
Supreme Court of the United States

SADEK R. EBEID, M.D., ex rel United States of America,

Petitioner,

-v.-

THERESA A. LUNGWITZ AND MRS. EDWARD C. IRBY, INDIVIDUALLY AND DBA HEALTH RESOURCE CENTER; HOME HEALTH RESOURCES, INC.; THE CROSSING: HOSPICE CARE, INC.;

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

Paul G. Ulrich
Counsel of Record
PAUL G. ULRICH, P.C.
131 E. El Caminito Dr.
Phoenix, AZ 85020
Tel: (602) 248-9465
Fax: (602) 248-0165
ulrichpc@aol.com

Noel C. Capps
Kevin R. Myer
RENAUD COOK DRURY MESAROS, P.A.
1 N. Central Ave., Ste 900
Phoenix, AZ 85004-4417
Tel: (602) 307-9900
Fax: (602) 307-5838
ncapps@rcdmlaw.com
kmyer@rcdmlaw.com

Attorneys for Respondents

November 5, 2010

QUESTIONS PRESENTED

1. Whether the Court need address the court-created doctrine of "implied false certification" with respect to claims filed under the False Claims Act?

2. Whether the Court should "remove" any particularity requirement in pleading when a *qui tam* plaintiff alleges a theory of liability pursuant to the "implied false certification" doctrine?

3. Whether Petitioner should be allowed to amend his Second Amended Complaint in this matter?

LIST OF PARTIES

Respondent Theresa Lungwitz ("Lungwitz"), a licensed Registered Nurse, was the sole owner of Defendant Health Resource Clinic ("HRC" or "the Clinic"), a private physician practice, until it closed in 2008. HRC physicians were employed by HRC from 1998 until it closed in 2008.

Respondent Lungwitz had been the sole owner of Defendant Home Health Resources, Inc. ("HHR") from on or about November 1, 1999. Respondent Margaret Irby ("Irby") was a co-owner of the HHR between April 1996 until on or about November 1, 1999, when she sold her shares to Lungwitz.

Lungwitz has been the sole owner of Defendant The Crossing Hospice Care, Inc. ("the Hospice"), which became eligible to bill Medicare on or about December 8, 2004. Irby is alleged to have worked with Lungwitz in the Hospice.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Respondent Health Resource Centers LLC is a Delaware corporation.

Respondents Home Health Resources, Inc. and The Crossing: Hospice Care, Inc., are Arizona business corporations.

No Respondent has a parent corporation. No publicly held corporation owns stock of Respondent.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is correctly reprinted in Petitioner's Appendix [see "Pet. App." at 1a-17a] and is reported at *Ebeid ex rel. United States. v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010).

The opinion of the United States District Court for the District of Arizona is correctly reprinted at Pet. App. at 18a-33a.

JURISDICTION

Petitioner has correctly stated the applicable dates of the Ninth Circuit's decision and its denial of Petitioner's petition for rehearing. The instant Petition was timely filed.

Petitioner also has correctly identified 28 U.S.C. §1254(1) as the basis for this Court's jurisdiction. The Petition raises a question of federal law and challenges a final decision of the Circuit Court.

STATUTES OR PROVISIONS INVOLVED

This Petition concerns the False Claims Act, 31 U.S.C. §3729(a) *et seq.* (2006 ed.). However, the Petition also concerns the pleading standards imposed by Federal Rule of Civil Procedure 9(b).

RESPONSE TO STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Petitioner correctly describes the history of the False Claims Act ("the FCA"), which originated during the Civil War to prevent widespread fraud against the Government. [*See* Pet. at 2, citing *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996).] Given the nature of the Act, "[t]he archetypal *qui tam* FCA action is filed by *an insider at a private company* who discovers his employer has overcharged under a government contract." *Hopper*, 91 F.3d at 1266 (emphasis added).

As the Ninth Circuit noted, Petitioner was "not an insider" in Respondents' businesses and "[did] not raise a typical FCA claim that Lungwitz overcharged the government":

> Instead, Ebeid alleges that all of the Medicare billing submitted by Lungwitz was unlawful under a theory of implied false certification. Ebeid alleges that the illegal corporate structure of the health care businesses gave Lungwitz a prohibited amount of control over the medical decisions of physicians employed in the various enterprises and that the health care businesses illegally referred patients amongst themselves.

Ebeid, 616 F.3d at 996. [*See also* Pet. App. at 5a.]

B. Facts

Petitioner's Second Amended Complaint alleged that Respondents "submitted false certifications to the federal government in connection with Medicare payments." [*See* Pet. at 2-3; See also Pet. App. at 83a-84a.] However, the Ninth Circuit held that the Second Amended Complaint failed "to plead the fraud with some level of specificity" by failing to "supply reasonable indicia that false claims were actually submitted" and by failing "'to give [Lungwitz] notice of the particular misconduct which is alleged to constitute the fraud charged so that [she] can defend against the charge and not just deny that [she has] done anything wrong.'" 616 F.3d at 999 (quoting *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051-52 (9th Cir. 2001)). [See also Pet. App. at 13a.]

The Second Amended Complaint was based in part on Petitioner's allegation that "[n]either Lungwitz nor Irby were ever licensed as physicians and the Clinic never held any license entitling it to deliver health-care services." [Pet. at 3.] However, the Ninth Circuit noted that "[t]he Second Amended Complaint does not refer to any statute, rule, regulation, or contract that conditions payment on compliance with state law governing the corporate practice of medicine." 616 F.3d at 1000. [*See also* Pet. App. at 14a.]

Although Petitioner claims that the Second Amended Complaint was based on Petitioner's version of the "corporate practice of medicine" doctrine [*see* Pet. at 3], the Ninth Circuit concluded that

> [t]he Second Amended Complaint does not refer to any statute, rule, regulation, or contract that conditions payment on compliance with state law governing the corporate practice of medicine. Instead, Ebeid baldly asserts that had Lungwitz "not concealed or failed to disclose information affecting the right to payment, the United States would not have paid the claims." This conclusory allegation is insufficient under Rule 9(b).

616 F.3d at 1000. [*See also* Pet. App. at 14a.]

The Second Amended Complaint did refer to the Stark Act. [Pet. at 3.] However, as the Ninth Circuit stated:

> Although the Stark Act may provide a valid basis from which to imply certification, because it expressly conditions payment on compliance ...[the Second Amended Complaint] simply alleges that Lungwitz "concealed and failed to disclose that the Clinic's physicians had a financial relationship to the Home Health Care Agency and the Hospice to which the physicians referred patients." The only clarification given is that allegedly unlawful "referrals ... were made by physicians who were employed by and whose livelihood depended upon Lungwitz."

616 F.3d at 1000. [*See also* Pet. App. at 15a.] Accordingly, the Ninth Circuit concluded that:

> These general allegations – lacking any details or facts setting out the "who, what, when, where, and how" of the "financial relationship" or alleged referrals – are insufficient under Rule 9(b). As with the corporate practice of medicine claims, a global indictment of Lungwitz's business is not enough.

Id. at 1000 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citation omitted). [*See also* Pet. App. at 15a.]

Petitioner also asserts that the "implied false certification" theory of liability means the mere "act of submitting a claim for reimbursement itself implies compliance with governing federal rules," citing *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001). [Pet. at 3.] However, in *Mikes*, the Second Circuit specifically rejected the applicability of "implied certification theory" to a claim based on the relevant Medicare reporting provision – 42 U.S.C. § 1320c-5(a) – because it does not contain a requirement for "certification" for payment:

> Instead, § 1320c-5(a) simply states that "[i]t shall be the obligation" of a practitioner who provides a medical service "for which payment may be made ... to assure" compliance with the section. Hence, it may be seen that § 1320c-5(a) acts *prospectively, setting forth obligations for a provider to be eligible to participate in the Medicare program.*

Mikes, 274 F.3d at 701 (emphasis added). Given that "Ebeid's position fail[ed] regardless," the Ninth

Circuit left this question open. 616 F.3d at 998 n.3. [*See also* Pet. App. at 9a.]

C. Proceedings Below

1. Respondents do not challenge the substance of Petitioner's description of the proceedings below. Petitioner's initial and First Amended Complaint were filed under seal, the Government chose not to intervene, and Respondents moved to dismiss both the First and Second Amended Complaints. The district court dismissed the Second Amended Complaint in a detailed 10-page decision. [*See* Pet. App. at 18a-31a.]

2. The Ninth Circuit provided Petitioner with the benefit of every legal ruling. The Ninth Circuit acknowledged that FCA claims could be based on a theory of "implied false certification," and further relaxed Rule 9(b)'s requirements in such cases to a mere showing of "'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" 616 F.3d at 998-99 (quoting *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180 (5th Cir. 2009)). [*See also* Pet. App. at 12a.] However, even with relaxed standards that required only an inference that the clinic's Medicare submissions represented an implied false certification, the Ninth Circuit still found Petitioner's Complaint wanting. The court found Petitioner's allegations regarding the "corporate practice of medicine" to be "bald[] assert[ions]" that Lungwitz "concealed or failed to disclose information affecting the right to

payment ... ." 616 F.3d at 1000. [*See also* Pet. App. at 14a.] Petitioner's allegations regarding the Stark Act were likewise held to be completely overbroad, simply amounting to "a global indictment of Lungwitz's business ... ." *Id.* [*See also* Pet. App. at 14a-15a.] Finally, the court found Petitioner's allegations of implied false certification of compliance with specific Medicare provisions equally lacking in specificity. *Id.*. [*See also* Pet. App. at 15a-17a.]

3. Following the Ninth Circuit's opinion, Petitioner petitioned for rehearing, urging that court to issue an order permitting him to amend his Complaint a third time. Despite an order from the district court dismissing his Complaint [*see also* Pet. App. at 31a-33a], Petitioner never moved the district court for leave to amend, nor did he raise the possibility of amending his Complaint with the Ninth Circuit prior to its opinion. [*See also* Pet. App. at 17a.] However, following the Ninth Circuit's opinion, Petitioner – for the first time – claimed that he had known all along of specific information that could satisfy the specificity requirement of Rule 9(b) but did not include such allegations in any prior version of his Complaint because he was not certain of the applicable amount of specificity required. The Ninth Circuit summarily denied rehearing without inviting a response from Respondents. [*See also* Pet. App. at 34a-35a.]

REASONS TO DENY THE PETITION

Petitioner, a California doctor, brought a complaint against an Arizona health-clinic alleging that every single bill submitted by the clinic to Medicare constituted a violation of the False Claims Act. Petitioner filed his FCA complaint without alleging any particular fraudulent act and without citing any particular Arizona statute or regulation to prove a violation of the "corporate practice of medicine."

Petitioner received multiple opportunities (in the form of an initial, a First Amended, and a Second Amended Complaint) in which to state a valid claim in compliance with Rule 9(b). Petitioner not only failed, he repeatedly asserted (up until argument before the Ninth Circuit) that he needed no opportunity to amend his Complaint, because he already had provided all information available and no additional information was required to assert his theory of liability.

Even after the district court dismissed his Complaint with prejudice, Petitioner still received all available benefits from the rulings of the Ninth Circuit. The Ninth Circuit recognized Petitioner's theory of "implied false certification." The Ninth Circuit analyzed Petitioner's Complaint under a relaxed standard for Rule 9(b). Nonetheless, despite these beneficial rulings, the Ninth Circuit still affirmed the district court's conclusion that Petitioner's Complaint was insufficient.

Given this context, the Petition presents invalid bases for this Court's exercise of certiorari. In an ef-

fort to convince this Court to grant review, Petitioner trumps up a false conflict among the circuits regarding the "implied false certification" theory, despite the fact that resolving this conflict would not change the result in this case. Petitioner also asks this Court to obliterate Rule 9(b)'s pleading requirements, even though the Ninth Circuit provided Petitioner with a relaxed standard for meeting this rule's requirements.

Ultimately, Petitioner's real reason for seeking certiorari is to request an opportunity to amend his Complaint a third time, despite the fact Petitioner claims he knew specific information of a particular fraud all along. Freeing Petitioner from his error and providing him with a "fourth bite at the apple" is an insufficient justification for certiorari.

I. The Implied False Certification Theory is Not an "Important, Recurring" Issue at Conflict Among the Circuits, Nor Is that Theory Relevant to Resolving this Litigation.

Although this Court's Rule 10(a) suggests that one reason for granting certiorari is to resolve a conflict among the circuits, not all disputes warrant the grant of certiorari. The issue also should be "an important and recurring one." *Miroyan v. United States*, 439 U.S. 1338, 1342-1343 (1978) (Rehnquist, J.), *quoted in Michael v. United States.*, 454 U.S. 950, 951 (1981)).

If the issue that Petitioner wants this Court to address is whether the theory of "implied false certi-

fication" should be applied to FCA claims in general, then no conflict appears to exist. The Ninth Circuit joined "the Second, Sixth, Tenth, and Eleventh Circuits" in "endors[ing] the implied false certification theory." *Ebeid,* 616 F.3d at 996. [*See also* Pet. App. at 7a.] Petitioner concedes this point. At best, all Petitioner can assert is that some circuits have not yet fully adopted the doctrine. [*See* Pet. at 8-9.] Accordingly, Petitioner utterly has failed to demonstrate a conflict among the circuits worthy of this Court's exercise of certiorari.

Even if the "implied false certification" theory represents a clear conflict among the circuits, certiorari nonetheless properly may be denied "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court ... ." *See, e.g., Ticor Title Ins. Co. v. Brown,* 511 U.S. 117,122 (1994) (dismissing writ as improvidently granted when "as matters ... develop[ ] it is not clear that our resolution of the [issue] will make any difference even to these litigants").

Here, the Ninth Circuit considered Petitioner's Complaint under the "implied false certification theory." The reason that Petitioner's Complaint failed to state a viable claim for relief has nothing to do with the Ninth Circuit's (or any circuit's) recognition of the "implied false certification" theory. The reason Petitioner's Complaint fails is due to the lack of specificity regarding the alleged fraud. No matter what theory of liability Petitioner asserts, his Complaint still must have some kind of specificity.

Because no real conflict exists among the circuits,

and because the Ninth Circuit afforded Petitioner the benefit of the "implied false certification" theory, the general viability and applicability of this theory is not a worthwhile issue for this Court's consideration.

II. No Conflict Exists Regarding the Applicability of Rule 9(b) to FCA Claims and No Policy Justifications Warrants Petitioner's Requested Complete Evisceration of Rule 9(b)'s Requirements.

Just as with the "implied false certification" theory, Petitioner also received the benefit of the Ninth Circuit's ruling on the applicability of Rule 9(b)'s heightened pleading requirements to his claim. The Ninth Circuit held that

> Ebeid [was] not required to allege "all facts supporting each and every instance" of billing submitted in violation of the Stark Act or the purported bar on the corporate practice of medicine ...

616 F.3d at 999 (quoting *Lee*, 245 F.3d at 1051-52). [*See also* Pet. App. at 13a.] The Ninth Circuit simply held that Rule 9(b) required Petitioner "to plead the fraud with some level of specificity," which in this case, the Ninth Circuit interpreted to mean "use of representative samples." *Id.* However, Petitioner argues that even this requirement is too onerous.

Petitioner again attempts to create a false conflict among the circuits, at least as that conflict might affect his case. Despite citing the opinions of circuits

that apply Rule 9(b) more strictly [*see* Pet. at 12-13], Petitioner avoids the fact that the Ninth Circuit *rejected* application of that stricter standard:

> We do not embrace the district court's categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims to support every allegation, *although we recognize that this requirement has been adopted by some of our sister circuits*. ... In our view, use of representative examples is simply one means of meeting the pleading obligation. *We join the Fifth Circuit in concluding*, in accord with general pleading requirements under Rule 9(b), that *it is sufficient to allege* "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."

616 F.3d at 998-99 (emphasis added) (internal citations omitted) (quoting *Grubbs*, 565 F.3d at 190). [*See also* Pet. App. at 12a.] Again, because this false circuit-conflict would not change the result in Petitioner's case, this issue is insufficient to warrant this Court's exercise of certiorari. *Ticor Title*, 511 U.S. at 122 (when this Court's "resolution of the [issue] will make any difference even to these litigants," case is not "certworthy").

Petitioner also suggests that recent changes to the FCA and Medicare-reporting provisions – such such as the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617 (codified as

amended in scattered sections of 18 and 31 U.S.C.) – justify eliminating Rule 9(b)'s requirements for such "Medicare" FCA claims. [*See* Pet. at 15-19.][1] Petitioner has not raised these arguments previously. Accordingly, these arguments do not provide a justified basis for a grant of certiorari. *See, e.g., U.S. v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule, as the dissent correctly notes, precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'").[2]

Finally, Petitioner claims that even the Ninth Circuit's relaxed standard for Rule 9(b) is too onerous when pleading a theory of "implied false certification," because "only those who have unclean hands, or who have partaken in the fraud themselves" would have sufficient information to provide the

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[1] Respondents are aware of only one case addressing Rule 9(b)'s specificity requirements with respect to the Fraud Enforcement and Recovery Act of 2009. *See United States ex rel. Folliard v. CDW Technology Services, Inc.*, 2010 WL 1541224, *10 (D.D.C. 2010) (nonetheless noting that "'Rule 9(b) is analyzed case by case.'") (quoting *United States ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 238 F.Supp.2d 258, 269-70 (D.D.C. 2002)). Without appellate review of any decisions addressing the interplay between the new Act and Rule 9(b), Respondents respectfully submit that this Court's exercise of certiorari would be premature.

[2] Petitioner also suggests that a House bill, H.R. 1788, 111th Cong. (2009) which was only reported out of committee (*see* H.R. Rep. 111-97), is sufficient reason for this Court to exercise its certiorari authority. Respondents simply note that members of Congress have introduced "False Claims Act Correction Acts" previously, and none have yet passed. *See* H.R. 4854, 110th Cong. (2007); *see also* S. 2041, 110th Cong. (2008). Aside from the fact that this legislation has not been passed or signed into law, Respondents assert that this issue is not yet ripe for this Court's consideration.

"dates and descriptions" of the improper billing. [*See* Pet. at 20.] However, Petitioner's belief that he could never meet Rule 9(b)'s requirements under an "implied false certification" theory is contradicted by his final request to amend his complaint in this matter. [*See* this brief, § III, *infra*.]

III. This Court Should Not Grant Certiorari Simply to Permit Petitioner to Amend His Complaint a Third Time with Information Petitioner Claims He Has Known All Along.

The first part of Petitioner's final argument is that this Court should grant certiorari to allow Petitioner to amend his Complaint to satisfy the "new pleading standard announced" by the Ninth Circuit in this case. This argument overlooks the fact that the Ninth Circuit analyzed the Second Amended Complaint under the new standard. *See* 616 F.3d at 999-1000. [*See also* Pet. App. at 13a-17a.]

Petitioner concedes that even his Second Amended Complaint does not meet even this relaxed standard. However, following the argument that Petitioner raised for the first time in his petition for rehearing with the Ninth Circuit, Petitioner now claims that he actually had specific information all along concerning a particular patient that would satisfy this "new" standard. [See Pet. at 22-23.] Apparently, Petitioner now needs an order permitting him to amend his Complaint a third time, despite the fact that he never previously requested such relief from the district court or from the Ninth Circuit. [*See* Pet. App. at 1a-31a.]

Petitioner's final argument is quite surprising. Petitioner confesses that he had specific information, "and had such information at the time the Second Amended Complaint was filed," regarding a specific patient that he *could have used* to satisfy the specific pleading requirement. [Pet. at 23.] However, Petitioner chose not to include this information or even to seek leave to amend the Second Amended Complaint, because he did not believe that this information would be sufficient to satisfy Rule 9(b)'s requirement. Petitioner omitted this information because, given "the state of the law at the time, it was impossible for these allegations to have become part of the record." [Pet. at 23.] Petitioner's decision to omit these allegations from the Second Amended Complaint also ensured that the allegations would not be part of the record, rather than providing the Ninth Circuit (or this Court) with the opportunity to review the analysis of the district court on this point.

Apparently, Petitioner's argument is that despite his knowledge that some form of specificity would be required, because he did not believe that the specific information he had would be sufficient, he elected to produce *no specific information* rather than *some*. Petitioner has been arguing for a more relaxed standard of Rule 9(b) since the Motion to Dismiss. [*See* Pet. App. at 29(a).]

Petitioner's argument is fatuous. It should be rejected out of hand, just as the Ninth Circuit did [see Pet. App. at 32a-33a] when Petitioner raised these precise arguments in his petition for rehearing. [*See* Pet. at 5.] Petitioner does not explain why he did not

submit the information he had and argue for a change in the law. Petitioner simply has waived this issue and seeks certiorari to undo his mistake.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Paul G. Ulrich
Counsel of Record
PAUL G. ULRICH, P.C.
131 E. El Caminito Dr.
Phoenix, AZ 85020

Noel C. Capps
Kevin R. Myer
RENAUD COOK DRURY
MESAROS, P.A.
1 N. Central Ave., Ste 900
Phoenix, AZ 85004-4417

Attorneys for Respondents

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